Petition

81-1905

No. 81-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ARCHIE E. BROWN,
Petitioner,

v.

FEDERAL ELECTION COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Federal Election Commission acted arbitrarily, capriciously, or contrary to law when it failed to state or provide any reasons whatsoever to explain or justify its dismissal of Petitioner's administrative complaint alleging serious violations of the election laws, especially where, as here, the Commission originally found "reason to believe" that the election laws *were* violated as alleged.

2. Whether the court of appeals erroneously relied on this Court's recent decision in *FEC* v. *Democratic Senatorial Campaign Committee*, 102 S.Ct. 38, 45 n.19 (Nov. 10, 1981) by ruling that a memorandum, allegedly prepared by the Commission's General Counsel (General Counsel's Report), discussing mixed questions of law and fact and purporting to summarize the staff investigation of the charges arising out of Petitioner's administrative complaint, can, in judicial review proceedings, serve or function as the statement of reasons of the Commissioners for their decision to dismiss the complaint where

a) the court of appeals recognized the Commission has a publicly stated policy that its decisions to dismiss complaints *might not* be based on the General Counsel's report;

b) the Commission admitted in court proceedings below that in this case it *did not* adopt the General Counsel's Report; and

c) the district court found that the General Counsel's Report constituted at the same time the *entire* administrative record in this case despite the fact that approximately 125 other documents were generated by the agency in the course of its investigation.

3. Whether, assuming, *arguendo*, that for purposes of judicial review, the General Counsel's Report can simultaneously serve or function as both the agency's state-

ment of reasons for dismissal of the complaint and the entire administrative record (upon which those reasons are allegedly based), the court of appeals erred in accepting that report without discussing its contents at all and ignoring the myriad substantive and procedural defects, errors of law and fact, and investigative irregularities contained in or alluded to in the report demonstrating arbitrary and capricious agency action.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Archie E. Brown, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in *Brown v. Federal Election Commission*, No. 80-2108 (D.C. Cir. Nov. 20, 1981).

OPINIONS BELOW

The November 20, 1981 decision of a panel of the court of appeals affirming the judgment of the district court is unreported and appears at Appendix ("App.") A at 1a. The January 15, 1982 Orders of the court of appeals denying Mr. Brown's petition for rehearing and suggestion for rehearing *en banc* are unreported and appear at App. B at 4a. The July 17, 1980 decision of the United States District Court for the District of Columbia is unreported and appears at App. C at 6a. The certification of the January 31, 1979 decision of the Federal Election Commission dismissing Mr. Brown's ad-

ministrative complaint without stating any reasons therefore is reproduced at App. D at 11a. The certification of the June 27, 1977 decision of the Federal Election Commission finding "reason to believe" that Local 745 of the International Brotherhood of Teamsters violated 2 U.S.C. § 441b as alleged in Mr. Brown's administrative complaint appears at App. E at 13a.

JURISDICTION

The judgment of the court of appeals was entered November 20, 1981. A petition for rehearing and suggestion for rehearing *en banc* was denied January 15, 1982. The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1) (1980). *See* 2 U.S.C. § 437g(a) (9) (1980).

STATUTES INVOLVED

This case concerns certain procedural and substantive provisions of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431 *et seq.* ("FECA" or "the Act"), specifically 2 U.S.C. § 437g(a) (9) (1976) and 2 U.S.C. § 441b(b) (3). They are set forth in App. F at 14a.[1]

STATEMENT OF THE CASE

Proceedings Before the Federal Election Commission

On or about June 3, 1977, Petitioner, pursuant to 2 U.S.C. § 437g(a) (1), filed a sworn administrative complaint with the Federal Election Commission (FEC) alleging that agents and officials of Local 745 of the Teamsters Union violated 2 U.S.C. § 441b of the Federal Election Campaign Act of 1971, as amended ("FECA" or "the Act") by denying him membership in the union and otherwise coercing him with threats and finan-

[1] During the course of this litigation, Congress amended the Federal Election Campaign Act of 1971 by the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980) in a manner not relevant here. Citations are to the pre-1980 FECA provisions.

cial reprisals to contribute to and join that union's Democratic Republican Independent Voter Education ("DRIVE") political action committee. App. H at 28a. Mr. Brown, a truck driver at the time, also indicated in his complaint that similar threats of coercion to join DRIVE were made against other union members by Local 745 officials.

On June 27, 1977, the Commissioners found that they had "reason to believe" that Local 745 violated 2 U.S.C. § 441b. App. E at 13a. The FEC staff then began an "investigation" of the solicitation practices of Local 745 for contributions to DRIVE as applied not only to Petitioner but also to the memberships of Local 745 as a whole. The purpose of the investigation was to gather facts which might indicate whether Local 745's solicitation practices were violative of FEC law and regulations

The "investigation," such as it was, consisted of attempts to secure information and documents from Local 745 and other witnesses.[2] At some unknown point in time, the investigation ceased and a document entitled "General Counsel's Report," purporting to summarize the results of the investigation and to analyze mixed questions of law and fact, was signed by the General Counsel on January 16, 1979. App. G at 19a.

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[2] Although described in more detail by Petitioner's briefs filed in the courts below and *infra*, Petitioner notes here just one example of the many gross irregularities of the FEC's arbitrary and defect-ridden investigation: Petitioner identified in his administrative complaint at least two key witnesses/participants to the "shakedown" that he received: George Prda, the Vice President of Local 745, and Garland Moore, a business agent of Local 745. App. H at 28a. The FEC issued subpoenas to both of them. Yet, for some inexplicable reason, Mr. Prda *was never deposed*. And for some other inexplicable reason, Garland Moore, who was deposed, *was never asked a single question* concerning the incident alleged in Petitioner's administrative complaint. Deposition of Garland Moore, Exhibit 17 to FEC's Motion for Summary Judgment.

Finally, on January 31, 1979, four of the six Commissioners voted that they found "no reasonable cause to believe" that Local 745 violated the solicitation prohibitions of 2 U.S.C. § 441b.[3] FEC Certification dated February 5, 1979, App. D at 11a. No reasons were stated or provided by the FEC explaining the dismissal.

By letter dated February 6, 1979, Mr. Brown was notified by the FEC that his administrative complaint was dismissed. App. D at 12a. Mr. Brown was not told why his complaint was dismissed. He was not provided with any General Counsel's Report or any other agency document. He was never informed by the FEC that he had a statutory right to seek judicial review of this dismissal within 60 days. 2 U.S.C. § 437g(a)(9).

Proceedings Before The District Court

On April 2, 1979, Archie Brown, having obtained counsel a few days earlier, filed a civil action pursuant to 2 U.S.C. § 437g(a)(9)(A) which provides for judicial review only in the U.S. District Court for the District of Columbia of FEC dismissals of complaints, or of the FEC's failure to act timely on the complaint. He alleged that the Commission's determination was made without stating any facts or reasons (Complaint ¶ 8), that he was notified of the FEC dismissal without being informed of any facts or reasons for the dismissal (Complaint ¶ 9), and that the FEC's investigation was not "fully and properly carried out," "considerations other than the merits of his complaint were taken into account," and that unlawful *ex parte* communications had occurred (Complaint ¶ 10) (Joint Appendix at 8). He sought relief declaring, *inter alia*, that the FEC's conduct was arbitrary, capricious, and contrary to law.

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[3] Commissioner Springer, who had participated in this case from the beginning, inexplicably recused himself from the case at the end. Commissioner Harris, who may have attended part of the January 31, 1979 meeting, was not present when the votes were actually cast. App. D at 11a.

The Commission filed an Answer to the complaint on July 3, 1979, admitting that its "determination was made without stating any findings of facts," but denied that the dismissal was made "without any statement of reasons whatsoever." Answer, ¶ (Joint App. at 14). On July 20, 1979, the FEC filed a Motion for Summary Judgment with uncertified copies of 22 Exhibits consisting of selectively chosen agency documents, including the 10-page General Counsel's Report, all of which purported to constitute some sort of agency administrative record.

On September 6, 1979, plaintiff filed his Opposition to the FEC's motion, along with his statement of Genuine Issues, and Affidavit under Rule 56(f) of the Federal Rules of Civil Procedure requesting that discovery be permitted to obtain evidence opposing the FEC's motion. On September 7, 1979, plaintiff filed a set of Interrogatories and Request for Production of Documents. The FEC filed its partial responses and objections to discovery.

On May 12, 1980, plaintiff filed his motion to compel the FEC to answer Interrogatories and produce documents which the FEC opposed. On June 24, 1980, the district court denied most of plaintiff's motion to compel, but did order the FEC to answer one Interrogatory relating to the administrative record.

On July 9, 1980, plaintiff filed his further opposition to the FEC's motion for summary judgment based on the limited information he had. On July 17, 1980, the district court granted the FEC's motion for summary judgment. The court ruled that the General Counsel's Report, not prepared or adopted by the Commission, was the only document before the Commissioners and constituted the entire administrative record in this case. App. C at 8a. The court then gratuitously ruled that the same General Counsel's Report, not adopted by the Commission, constituted the statement of reasons by the Commissioners for their dismissal of Mr. Brown's complaint. *Id.* Finally, the

court, without addressing *any* of the irregularities and inconsistencies of the report and the investigation, summarily found that the report was sufficient and therefore, the Commission did not act arbitrarily, capriciously, or contrary to law in dismissing the administrative complaint.

Proceedings Before the Court of Appeals

Petitioner appealed the district court's opinion to the U.S. Court of Appeals for the District of Columbia Circuit arguing, *inter alia*, that the Commissioners themselves, rather than their General Counsel, must explain or provide a statement of reasons for the dismissal of a person's complaint in order that intelligent judicial review may be had.

On October 23, 1981, oral argument was held, and, as the following excerpt of the hearing transcript indicates, the court was obviously concerned with the lack of a statement of reasons:

> *The Court*: If you could start by addressing the question, did the Commission provide a statement of reasons for its decision in this case, did it do that?
>
> *FEC Counsel*: Provide to the Court, to the complaining parties—
>
> *The Court*: Did the Commission provide anything publicly?
>
> *FEC Counsel*: The Commission did notify Mr. Brown that it was closing its files in this matter.
>
> * * * * *
>
> *The Court*: Did it state the grounds for its finding that there was no reasonable cause?
>
> *FEC Counsel*: The underlying factual basis?
>
> *The Court*: Yes.
>
> *FEC Counsel*: No, Your Honor.
>
> *The Court*: Is it true that the Commission takes the position that its decisions are not necessarily based

on the reasons presented in the general counsel's report, is that true?

FEC Counsel: Yes. That has appeared in the Federal Election Commission record, as [appellant's] counsel has pointed out.

The Court: *But we have no basis for taking as the Commission's reasons in this case general counsel's reasons, is that correct?*

FEC Counsel: Well, I am not sure that that is really the question on judicial review, Your Honor. I am—

The Court: I am asking you if you will address that question. *I think it is relevant, so I would appreciate a clear answer to it. Am I correct in stating that the Commission in this case did not adopt the reasons of the general counsel?*

FEC Counsel: The Commission did *not* adopt the general counsel's report.

* * * *

The Court: Even if we were to think—not assuming we would, but if we were to think—that what appears in the general counsel's report with respect to non-payment of dues would be an adequate explanation for denying [him admission] to the union. Would we have any assurance that that would be the Commission's reason for doing so on this record, in looking at the documents?

FEC Counsel: Since the Commission did not expressly—

The Court: *Do we have any way of being absolutely certain that that was the good cause* of whatever it is, reason to believe or whatever the language was in the Commission's certification? *Would we have any assurance that that was done?*

FEC Counsel: Again, Your Honor, *no perhaps not.*

Transcript, Oct. 23, 1981 at 4-6 (emphasis added).

Subsequent to the oral argument in the court of appeals, this Court issued its opinion on November 10, 1981, in *FEC v. Democratic Senatorial Campaign Committee (DSCC)*, 102 S.Ct. 38 (1981), holding that 2 U.S.C. § 441a(d)(3) is not violated as a matter of law when a state committee of a political party designates the national senatorial campaign committee of that party as its agent for the purpose of making expenditures allowed by FECA. On November 20, 1981, the court of appeals issued an unpublished Judgment and accompanying Memorandum dismissing the appeal in this case and affirming the district court, stating in pertinent part:

> On appeal, Brown vigorously contends that the Commission's unadorned finding of "no reasonable cause to believe" affords an inadequate basis for informed judicial review. While the statement of reasons provision of the Administrative Procedure Act, 5 U.S.C. § 555(e), and the enforcement mechanisms of the Federal Election Campaign Act, 2 U.S.C. § 437g (1976 & Supp. IV 1980), might be read to support Brown's position, *cf. Dunlop v. Bachowski*, 421 U.S. 560, 571-74 (1975), the Supreme Court, in a decision handed down subsequent to oral argument in this case, *FEC v. Democratic Senatorial Campaign Committee*, 500 U.S.L.W. 4001 (U.S. Nov. 10, 1981) has ruled otherwise. The Court determined that the General Counsel's report, although not expressly adopted by the Commission, constitutes sufficient grounds to support a decision to dismiss an administrative complaint [referring to 102 S.Ct. at 45, n.19].

App. A at 2a-3a.

Without benefit of any briefing or argument on which the panel based its decision, the court of appeals, relying on *dicta* in a footnote of this Court's opinion in *FEC v. DSCC*, adopted a totally new principle of administrative law: that agency decisionmakers need *not* articulate nor provide a complaining party or a reviewing court with a statement of reasons as to why they

took final agency action on a matter that Congress expressly made judicially reviewable. The court of appeals held instead that an opinion allegedly drafted by the FEC General Counsel, but never adopted by the Commissioners, is a sufficient basis upon which judicial review of agency action may be conducted.

The court then summarily accepted that report 1) without *any* discussion or analysis of its contents; 2) without addressing the myriad deficiencies and irregularities of the investigation and the report which were demonstrated by the Petitioner; and 3) without resolving the inherent flaw or anomaly of the General Counsel's Report functioning simultaneously as both the entire administrative record *and* the agency's statement of reasons.

Petitioner filed a petition for rehearing and suggestion for rehearing *en banc* on December 23, 1981. On January 15, 1982, the court of appeals denied the petition and suggestion for rehearing *en banc*. App. B. Subsequently, Petitioner determined to seek review of the appellate court's judgment by filing this petition.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS HAS ERRONEOUSLY DECIDED AN IMPORTANT QUESTION AS TO THE PROPER FUNCTION OF JUDICIAL REVIEW OF AGENCY ACTION AND HAS THEREBY SANCTIONED AGENCY MISCONDUCT.

The court of appeals, which at times has been reprimanded by this Court for exceeding its powers of judicial review of agency action,[4] has now all but abandoned its judicial responsibilities for reviewing agency action. By not requiring agency decisionmakers to explain their decision, and to leave unsettled the composition and function of the agency's administrative record in a particu-

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[4] *See, e.g., Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

lar case, the court of appeals radically departed from accepted judicial review procedures and has reduced the role of judicial review to a perfunctory process of rubber-stamping an agency's decision. Such a result clearly frustrates the intent of Congress, does violence to this Court's prior opinions,[5] and was not intended by this Court in *FEC v. DSCC* to be proper judicial review procedure. Not only does the court of appeals decision affect the entire enforcement procedures of the Federal Election Commission, but it has the clear potential of having a significant effect on the administrative procedures of other government agencies and, concomitantly, on judicial review of those agencies' actions as well. Thus, Petitioner submits that 1) the exercise of this Court's power of supervision is warranted in this case; 2) the court of appeals decision conflicts with applicable decisions of this Court; and 3) to the extent of its application of footnote 19 in *FEC v. DSCC*, the court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court. *See* SUP.CT.R. 17.

A. The Availability And Scope Of Judicial Review Under FECA.

The Federal Election Campaign Act of 1971, as amended (FECA) 2 U.S.C. §§ 431, *et seq.*, is a reform measure designed to restore the integrity in the electoral process and to reduce corruption or the appearance of corruption in campaign financing. *See Buckley v. Valeo*, 424 U.S. 1 (1976). To that end, Congress established in 1975 the Federal Election Commission, an independent federal agency, to administer and enforce the campaign laws. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263.

As an integral part of the enforcement scheme, Congress, for the first time, expressly provided a statutory

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[5] *See, e.g., Dunlop v. Bachowski*, 421 U.S. 560, 571 (1975).

mechanism whereby individual citizens could file complaints of alleged election law violations with the FEC for investigation and prosecution. Congress also expressly provided for a private cause of action by the complainants against the Commission, and, ultimately, against the respondent, if a reviewing court decided that the Commission's actions or inactions with respect to a complaint were arbitrary, capricious, or contrary to law. 2 U.S.C. § 437g(a)(9) (1976). These express provisions for a private cause of action are compatible with Congress' intent to ensure enforcement of the election laws, and settle the question of the availability of an implied cause of action to challenge election law violations. *See Cort v. Ash*, 422 U.S. 66 (1975).

Thus, although the Commission may have broad discretion in investigating and prosecuting violations of the election law, that discretion is not unlimited nor can it be abused. Congress obviously contemplated that the FEC may not always act in accordance with law, and expressly provided for expedited judicial review of that agency's action. Congress even went further by adding a "private attorney-general" provision allowing individuals to sue directly the violators of the election laws, should the FEC fail to carry out their judicially ordered enforcement responsibilities. 2 U.S.C. § 437g(a)(9)(C). *See Bread Political Action Committee v. FEC*, 50 U.S.L.W. 4291 at 4294 (March 8, 1982). Consequently, the reviewing court must carefully scrutinize Commission action in order to ensure that the intent of Congress—to see that the election laws are enforced—is carried out.[6] The court below failed to conduct such review.

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[6] Unlike statutory judicial review provisions for some agencies which permit review in the various United States Courts of Appeals, the FECA provides that judicial review of the FEC's disposition of enforcement actions lies instead within one court only—the United States District Court for the District of Columbia, with appeal to the U.S. Court of Appeals for the D.C. Circuit. 2 U.S.C. § 437g(a)(9)(A). Consequently, there could

B. The Federal Election Commission Must Provide The Reviewing Court With The Commissioners' Statement Of Reasons For The Agency Action, But Failed To Do So.

A basic and fundamental proposition of administrative law misapplied by the court below is that an agency must provide a reviewing court at the minimum with a statement of reasons to explain or justify significant agency action, conduct, decisions, and orders, even when the agency's organic statute does not expressly require it. 5 U.S.C. § 555(e); *Dunlop v. Bachowski*, 421 U.S. 560, 571 (1975); *Camp v. Pitts*, 411 U.S. 138 (1973); *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 235, 246 (1972); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971); *Investment Co. Institute v. Camp*, 401 U.S. 617, 628 (1971); *SEC v. Chenery Corp.*, 332 U.S. 194 (1946); *U.S. v. Carolina Carriers Corp.*, 315 U.S. 475, 489 (1942); *Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37, 50 (D.C. Cir. 1978); *Matlovich v. Sec'y of the Air Force*, 591 F.2d 852, 856 (D.C. Cir. 1978); *National Association of Food Chains, Inc. v. ICC*, 535 F.2d 1308 (D.C. Cir. 1976); *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 598 (D.C. Cir. 1971); *American Trucking Association v. FCC*, 377 F.2d 121, 134 (D.C.Cir. 1966), *cert. denied*, 386 U.S. 943; *D.C. Federation of Civic Associations v. Volpe*, 459 F.2d 1231 (D.C.Cir. 1971), *cert. denied*, 405 U.S. 1030, (1972); *City Federal Saving and Loan Association v. Federal Home Loan Bank Board*, 600 F.2d 681, 688 (7th Cir. 1979); *Hall v. Marshall*, 476 F. Supp. 262 (E.D. Pa. 1979) *aff'd*, 622 F.2d 578 (3d Cir. 1980); *State of Maine*

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never be a direct conflict among the circuits on the specific issues presented in this Petition. Perhaps for that reason alone, review by this Court is all the more warranted in order to settle the important issues raised by this Petition. There appears, however, to be a conflict among the circuits on the broader issue of the requirement of the statement of reasons and the role of an agency's administrative record.

v. Kreps, 563 F.2d 1043 (1st Cir. 1977); *Hempstead Bank v. Smith*, 540 F.2d 57 (2d Cir. 1976); *Ace Motor Freight, Inc. v. ICC*, 557 F.2d 859 (D.C. Cir. 1977); *Contractors Transport Corp. v. United States*, 537 F.2d 1160 (4th Cir. 1976).

As stated by this Court in *Bachowski*:

> [A] statement of reasons must be adequate to enable the court to determine whether the Secretary's decision was reached for an impermissible reason or for no reason at all. For this essential purpose, although detailed findings of fact are not required, the statement of reasons should inform the court and the complaining union member of both the grounds of decision and the essential facts upon which the Secretary's inferences are based.

Noted commentator Professor Kenneth Culp Davis recognized the importance of the *Bachowski* rationale and stated:

> *When a statute is silent about findings and reasons but a court holds* [or a statute provides] *that informal administrative action is reviewable, a statement of reasons is required to allow intelligent review.*

K. Davis ADMINISTRATIVE LAW TREATISE, § 16.00-8 at 99 (1980 Supp.) (emphasis in original).[7]

And although the Federal Election Commission has a practice of not expressing its reasons in disposing of the complaints filed by the public, that practice has not been universally sanctioned by the Commissioners. In disposing of a complaint captioned Matter Under Review (MUR) 105, then Commissioner Staebler filed this statement in the record:

> I believe we owe an explanation in our letters to the complaining party, party complained against, and to

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[7] For an excellent analysis on the applicability of *Bachowski*, see Davis, *supra*, at §§ 16.00-8, 9, 10.

> the public of our reasons for terminating a matter under review. Since the letter conveys no reason for the Commission having terminated its review, I must file this statement. . . .
>
> [Statement of reasons of Commissioner Staebler]
>
> * * * *

Statement of Commissioner Staebler in MUR 105 dated August 9, 1976 (Appellant's Main Brief at 19).

Plaintiff submits that this view of then Commissioner Staebler is absolutely correct as a matter of law and sound public policy. No court is able to uphold a decision of the FEC if that agency does not even provide reasons for its decisions. The agency was established by Congress in the wake of the Watergate scandal to restore the public's confidence in the electoral process. That confidence is clearly undermined when the FEC gives the appearance of acting in an arbitrary manner. It is further undermined where, as here, Petitioner alleged that the Commission engaged in *ex parte* communications, that his complaint was not fully and properly investigated, that the Commission staff was pressured to close the case, that a Commissioner recused himself in the case at the last minute, and where the former Chairman of the FEC is on record stating that some of the Commissioners have a bias in favor of organized labor, the very target of Petitioner's complaint.[8]

C. The General Counsel's Report Is Not The Comsioners' Statement of Reasons.

As noted by the court below and admitted by the FEC, the Commission has a policy of not necessarily relying on the General Counsel's Report in a given case, and

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[8] Letter of then FEC Chairman Max L. Friedersdorf to Congressman John Rhodes, June 4, 1979. ("Some members of the Commission do have strong pro-labor backgrounds and *are vigorous in their efforts to see that labor's interests are protected when cases involving labor political activities are presented to the Commission.*") Id. (emphasis added) (Joint App. at 60).

admitted that in this case it did not adopt the report. App. A; Petition at p. 7, *supra*. Under these circumstances, the opinion of the FEC's General Counsel cannot be imputed to the Commissioners.

As stated by this Court in *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 235 (1972):

> The difficulty with the Commission's position is that we must look to its opinion, not to the arguments of its counsel, for the underpinnings of its order. 'Congress has delegated to the administrative official and not to the appellate counsel the responsibility for elaborating and enforcing statutory commands.' *Investment Co. Institute v. Camp*, 401 U.S. 617, 628, 91 S.Ct. 1091, 1097, 28 L.Ed. 2d 367 (1971).

Id. at 246.

Similarly, in *KFC National Management Corp. v. NLRB*, 497 F.2d 298 (2d Cir. 1974), the Second Circuit Court of Appeals, in striking down the Commissioners' voting proxies to its staff, reviewed Congress' general distrust of review attorneys and staff assistants "who are, of course, neither appointed by the President nor approved by the Senate" as are the NLRB Commissioners. *Id.* at 303. This distrust of NLRB staff is also carried over into the FECA, where Congress mandated that:

> A member of the Commission may not delegate to *any person* his vote *or any decision-making authority or duty vested in the Commission* by the provisions of this title.

2 U.S.C. § 437c(c) (emphasis added).

The *KFC* court further noted that although assistants may prepare drafts of reports and summaries to *aid* the decisionmakers, there was nevertheless "no evidence that the Board members considered this case," *i.e.*, the evidence and record. 497 F.2d at 306.

Nor does the Commission describe how it reached the conclusion it did in this case. For all we know, the de-

cision could have been made by the toss of a coin. As stated by Judge Wilkey in similar circumstances:

> The Commission nowhere even vaguely described how it aggregated its findings into the decisive balance; rather, we are told that the conclusion is based on 'administrative feel.' Such institutional forms of decision-making, completely opaque to judicial review, fall somewhere on the distant side of arbitrary.

Central Florida Enterprises, Inc. v. FCC, 598 F.2d 37, 50 (D.C.Cir. 1978). *See also Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 598 (D.C.Cir. 1971).

D. The Composition of the Administrative Record.

As noted, the district court found that the entire administrative record consisted of only the General Counsel's Report. App. C at 8a. As argued by Petitioner in the court of appeals, [Appellant's Brief at 21-26], it is improper agency conduct for such a report to constitute both the entire administrative record and the Commission's statement of reasons, and consequently, it was clear error for the court of appeals to accept such report.

As stated by the Seventh Circuit Court of Appeals in *City Fed. Sav. & Loan Ass'n v. Federal Home Loan Bank Board*, 600 F.2d 681 (7th Cir. 1979):

> The Court cannot properly restrain its review unless the agency gives an adequate explanation of the connection between the *record* before it and the choice it makes. (cases cited omitted). *The courts do not supply the connecting reasons on review; to do so would result in our fashioning policy and standards for agency action* (cases cited omitted).

Id. at 688-89 (Emphasis added)

In *City Federal*, there was at least a statement of reasons provided the court by the agency as to why it took the action it did. Yet the court held that even those rea-

sons were insufficient, and remanded the case to the agency for further clarification of its decision. *Id.* at 693. No reasons, let alone sufficient ones, were presented in this case. Indeed, it might seem that it would be impossible for the FEC to give any "connecting reasons" to the record before it, since the district court found the administrative record and the report/statement of reasons to be one and the same. In short, there is simply nothing to "connect" to. The FEC's "connecting" reasons are instead circular ones.[9]

And even if the Commissioners expressly stated that they had before them and adopted the General Counsel's Report, as suggested by the district court [App. C at 9a] that would not cure the fundamental irregularity in the FEC's disposition of administrative complaints. The Commissioners should not have before them just the General Counsel's Report; they should have the entire investigative file of the case. Otherwise, the Commission will ignore the full administrative record and evidence and simply rubber-stamp a summary staff document.

Petitioner is not suggesting that the FEC Commissioners must examine each and every piece of paper

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[9] It should also be noted that the plaintiff's counsel in *City Federal, supra*, tried to demonstrate by way of affidavit in the District Court that he believed the decisionmakers acted improperly and did not in fact review the entire administrative record, but only the 17-page summary or staff digest of the record, a document that is functionally equivalent to the General Counsel's Report in the instant case. The Seventh Circuit upheld, however, the lower court's decision to disregard the affidavit as being insufficient to overcome the presumption of agency regularity that the decisionmakers "*considered* the *entire* administrative record, consisting of 531 pages in the *City Federal* case and 382 pages in the [companion] *Mutual* case." *Id.* at 687 (emphasis added).

In the instant case, Petitioner need not submit any such affidavit to overcome the presumption of agency regularity; the FEC itself has done it for him when they certified in discovery that the *only* document before their decisionmakers *was* the 10-page staff report.

generated in the course of an investigation, but they must review some modicum of an administrative record. As it now stands, the FEC simply has no idea what the administrative record is in this or any other case. And the courts do not have the authority to fashion one for the agency. *See Camp v. Pitts*, 411 U.S. 138, 142; *Citizens Committee to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

E. Footnote 19 of *FEC* v. *DSCC*.

Footnote 19 of *FEC v. DSCC* states in full:

> Nor does the fact that [1] the Commission, following its customary practice, did not expressly adopt the General Counsel's report in announcing its decision "deprive[] a reviewing court of any Commission record on which to base a deferential decision." —— F.2d, at ——. [2] The Court of Appeals previously has held that the General Counsel's report to the Commission is sufficient to support the Commission's dismissal of a complaint. See *Hampton v. Federal Election Commission*, 2 Fed. Elec. Camp. Fin.Guide (CCH) ¶ 9036, at 50, 439-50, 440 (D.C. 1977). aff'd No. 77-1546 —— U.S. App. D.C. ——, (July 21, 1978) (unpublished opinion). [3] In this case, the General Counsel's Report was made public simultaneously with the Commission's ruling. [4] It was the third occasion on which the Commission followed the General Counsel's advice in this matter. [5] Even without an express statement, it is sufficiently clear that the staff report provides the basis for the Commission's action.

102 S.Ct. at 45, n. 19.

There are basically 5 parts to this footnote that need examination. It should be noted at the outset that the issue of whether the FEC's General Counsel's Report may be judicially substituted as the reasons of the decisionmakers was *not* a question before the Supreme Court in *FCC v. DSCC*, and no oral argument was had

on that point. Surely, this Court would not have intended that such a footnote would effectively reverse a long line of judicial precedents to the contrary. In any event, the *FEC v. DSCC* case is clearly distinguishable from the instant case.

(1) That this Court recognized in footnote 19 that the Commission has a "customary practice" of *not* expressly adopting the General Counsel's report is beside the point in this case. Petitioner submits that the Commission is free to adopt or reject the General Counsel's report. What it must do, however, is provide its own reasons for its decisions that connect the result reached with the evidence gathered in the case. In *FEC v. DSCC*, the question presented to the Commission and subsequently to the reviewing courts *was a pure question of law, i.e.*, whether 2 U.S.C. § 441a(d)(3) permits certain financial arrangements in the form of agency agreements between the National Republican Senatorial Committee and state party committees. Consequently, there was *one and only one agency document* generated in the case, namely the General Counsel's legal analysis of this pure question of law.

In this case, however, there are well over one hundred agency documents, including depositions and other evidence, that were generated in the course of the FEC's "investigation" into the *facts* of this case. The General Counsel's Report was ostensibly an attempt by that attorney to analyze whatever facts were gathered, characterize them, and ascribe legal conclusions to them. Surely such a case presenting mixed questions of law and fact is certainly not on the same par as the one pure legal issue presented in *FEC v. DSCC*. Even so, this Court did a *thorough* independent review of the statutory interpretation of 2 U.S.C. § 441a(d)(3) and basically concluded that the interpretation given that provision by the FEC's General Counsel to the Commissioners *not* to begin an enforcement action, was compatible with this Court's interpretation. No such judicial review was given here by the courts below.

(2) This Court misstated in footnote 19 that the court of appeals "previously has held that the General Counsel's report to the Commission is sufficient to support the Commission's dismissal of a complaint" citing *Hampton v. FEC*, No. 77-1546 (July 21, 1978). Petitioner submits it was no accident that this part of footnote 19 was not relied upon by the court of appeals in the instant case because that court did *not* hold in *Hampton v. FEC* that the General Counsel's report was sufficient to support the Commission's dismissal of a complaint. Indeed, as was pointed out by Petitioner in the court below, the issue was *never* litigated or raised by either party on appeal in *Hampton*.[10] The court of appeals in *Hampton*, like this Court in *FEC v. DSCC*, was dealing basically with a question of law as evidenced by its holding:

> Thus, [Hampton's administrative] complaint was reduced to the proposition that under the circumstances alleged the funds [received by Hampton's opponent], *as a matter of law*, were reportable "contributions." In our view under relevant provisions of the Act, see 2 U.S.C. §§ 431(e)(1)-(4), and the Court's construction of the Act in *Buckley v. Valeo*, 424 U.S. 1, 23-24 N. 24 (1976) (per curiam), the allegations in this complaint do not support that proposition.

Hampton v. FEC, No. 77-1546 (D.C. Cir. 1978) (unpublished opinion at 4) (emphasis added).

Accordingly, this Court's reliance on *Hampton v. FEC* was misplaced and the *Hampton* opinion is of dubious authority for the proposition that the General Counsel's Report can suffice as the decisionmakers' reasons.

(3) With respect to the third part of footnote 19, it should be noted that the General Counsel's Report in this case was never given to Petitioner nor was he even notified of its existence, even though it was eventually made

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[10] *See* Appellant Brown's Brief below at 15-16; *see also* all appellate briefs filed in *Hampton v. FEC*.

available at the FEC. In any event, this point is hardly relevant in this case, especially in light of the FEC's position that their decision may not be based on the report.

(4) This Court stated further in footnote 19 that this was "the third occasion" on which the Commission ruled on the applicability of 2 U.S.C. § 441a(d)(3), and such rulings were consistent. In this case, however, there was only *one* prior ruling, and that was a ruling *in favor of Mr. Brown's position, i.e.*, that there *was* "reason to believe" that he and others were coerced to contribute to the union's political action committee. App. E. In short, there was a later *switch* of the FEC's position, a result reached whenever the Commission decides to drop a case after an initial factual investigation into a complainant's allegations. A clear statement of reasons is all the more warranted in such a situation.

(5) This Court concluded footnote 19 by stating that it was clear the "staff report provides the basis for the Commission's action." Here, where we are dealing with mixed questions of law and fact, it is anything but clear. As noted, the staff report in *FEC v. DSCC* was the *only* document generated in that case. Normally, all the evidence generated in a case provides a basis of an agency's action, and in this case there were well over 100 evidentiary documents. But the District Court found as a matter of fact that the entire administrative record in this case consisted of only this staff report. The Commissioners never examined or reviewed the evidence contained in the other documents. Furthermore, as demonstrated *infra*, the staff report in this case and some of the evidence from the investigation contain serious shortcomings on factual and legal analysis.

Accordingly, Petitioner submits that the Court of Appeals seriously misconstrued the Court's statement in footnote 19 of *FEC v. DSCC* and in so doing, radically departed from its proper judicial review functions.

II. ASSUMING, *ARGUENDO*, THAT THE GENERAL COUNSEL'S REPORT CAN FUNCTION AS BOTH THE STATEMENT OF REASONS, AND THE ENTIRE ADMINISTRATIVE RECORD, AN EXAMINATION OF THAT REPORT, AS WELL AS THE DOCUMENTS SELECTIVELY SUPPLIED THE COURT BY THE FEC, CLEARLY SHOW THAT THE FEC'S ACTION AND CONDUCT WAS ARBITRARY, CAPRICIOUS, AND CONTRARY TO LAW.

Even if the court below were correct in finding that the General Counsel's Report was both the statement of reasons of the Commissioners and the administrative record, Petitioner submits that those reasons cannot withstand the second level of judicial review of administrative action, *i.e.*, whether those reasons are sufficient and reasonably justify the agency's conclusion to terminate and dismiss Petitioner's administrative complaint, especially in light of the serious irregularities and shortcomings of the investigation and the staff report.

Unfortunately, the court of appeals gave no reasons whatsoever why it accepted the General Counsel's Report as reasonable. App. A at 3a. The district court was similarly unilluminating, affording a total of two sentences to the matter.[11]

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[11] It [the Report] . . . includes a statistical analysis of DRIVE contributions at local 745 to show the improbability of plaintiff's allegation. The report clearly indicates that plaintiff's membership in Local 745 was denied because his union dues were unpaid, not because he refused to contribute to DRIVE.

District Court Memorandum, App. C at 9a.

The district court does superficially mention in these two sentences the two main issues, 1) the union-wide violations, and 2) Archie Brown's personal coercion, but any "analysis" that can be squeezed from these statements is hardly meaningful. The district court's analysis amounts to no more than a judicial rubber-stamp of the Commissioners' rubber-stamp of a report ostensibly authored by the General Counsel who did none of the underlying investigation.

Neither the district court nor the court of appeals even attempted to address *any* of the serious irregularities, inconsistencies, and defects brought to their attention by Petitioner showing arbitrary and capricious agency action. Because of space limitations, Petitioner is unable to list them all here [*see* Appellant's Brief at 27-40], although a few examples are in order.

1. As noted at p. 3, n.2, *supra*, the FEC noticed the deposition of the union's Vice-President George Prda, a key witness/participant to the illegal coercion, but inexplicably *failed* to take his deposition. Another key witness, Garland Moore, was deposed, but was *never asked a single question* about the incident.

2. With respect to systemic coercion, the report notes that Local 745's "solicitation process appears to perhaps create a coercive climate which could cause an applicant for union membership to think that he had to also join DRIVE." App. G at 23a. The General Counsel's Report concluded, however, that there was no systemic pattern of coerced or involuntary contributions because the contribution rate among Local 745 members to DRIVE was not high enough to show coercion. App. G at 23a-26a. Yet a comparison between the very yardstick selected by the General Counsel as indicative of a voluntary contribution rate scheme—16 percent [App. G at 23a] [the rate in *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 418 n.30 (1972)]—and the statistics supplied the FEC by the union, indicate that the Local 745's contribution rate, as a whole, was at least *three times greater* than the voluntary rate. (App. G at 25a).[12] And, with respect to a subcategory of union members, *i.e.*, those physically applying for membership at the union hall, the General Counsel's Report stated that "although by the union officials' own admission there has been an

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[12] *See FEC v. Nat'l Education Ass'n*, 457 F. Supp. 1102 (D.D.C. 1978) (prior voluntary rate found to be 10-12 percent).

almost 100 percent success rate of DRIVE commitments from those applying for membership at the union hall, *it can be argued that the business agents were merely very persuasive*" in convincing the union member to contribute voluntarily to DRIVE. App. G at 26a. (emphasis added). Mr. Brown certainly did not argue that the business agents were being "merely very persuasive." Nor did even the union officials or their attorneys have the effrontery to explain the highly unusual 100 percent success rate on the basis that the business agents were being "merely very persuasive." What was the General Counsel's methodology for concluding as he did that Local 745's contribution rate was not high enough to evidence coercion? What was the Commissioners' methodology?

3. The report also states that "Charles Rogers has stated, under oath" that Petitioner's allegedly delinquent dues [in Local 886] was the "reason . . . Brown was denied membership [in Local 745]." App. G at 22a. However, if the Commissioners or the court below would have examined a copy of the deposition of Charles Rogers, they would have discovered that Mr. Rogers made no such statement. Indeed, Mr. Rogers testified that Mr. Brown's hostility to joining DRIVE may have been discussed at the union meeting when the vote was taken to determine Mr. Brown's membership status. Rogers' Deposition at 22; Appellant's Main Brief at 30.

4. The General Counsel's Report describes the law on permissible solicitation activity as mere FEC "guidelines" found in Advisory Opinion "AO 1976-23" [sic]. App. G at 22a. Why was there no mention or discussion of no mere "guidelines" but the very law itself, *i.e.*, 2 U.S.C. §§ 441b(b)(3)(A)-(C) [App. F at 17a]? *See also* 11 C.F.R. § 114(a)(2).

> Restated, a contribution to a PAC *must be* wholly voluntary. Such a contribution *cannot* be obtained by force or threat, it must be consensual, it may be made *only* after the purpose of the PAC has been disclosed

> and even then, *only* if the potential contributor knows he has the right to refuse to give to the fund with no risk of reprisal.

Int'l Assoc. of Machinists v. Federal Election Commission, —— F.2d —— (D.C. Cir., April 6, 1982) (en banc) (emphasis added). The evidence *not* contained in the General Counsel's report shows not only that many members of Local 745 do not even know what DRIVE is, but also the existence of coercive and illegal techniques to force political contributions.

These examples are only four of the many procedural and substantive defects gleaned from the 30 documents that the FEC has selectively chosen to submit to the court out of the 125 or more that were generated in the course of the investigation. Petitioner can only surmise the extent of the defects contained in documents which the FEC has steadfastly refused to divulge.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully prays that his Petition be granted.

Respectfully submitted,

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April 15, 1982

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

No. 80-2108

ARCHIE E. BROWN,

Appellant

v.

FEDERAL ELECTION COMMISSION

Filed Nov. 20, 1981

Appeal from the United States District Court
for the District of Columbia

Before: McGOWAN, Senior Circuit Judge, GINSBURG, Circuit Judge, and Philip Nichols, Jr.,* Judge, United States Court of Claims.

JUDGMENT

This case was considered on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. The issues presented have been accorded the court's full consideration; they occasion no need for an opinion. *See* D.C. Cir. R. 13(c). For the reasons stated in the accompanying memorandum, it is

ORDERED and ADJUDGED that the judgment of the district court appealed from in this case is hereby affirmed.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

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* Sitting by designation pursuant to 28 U.S.C. § 293(a) (1976).

MEMORANDUM

On June 7, 1977, appellant Archie E. Brown filed a complaint with the Federal Election Commission. He asserted that officials of Local 745 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America had violated the Federal Election Campaign Act by refusing to permit him to transfer his membership from Local 886 because he declined to contribute to the union's political action committee. He also claimed that others had encountered similar pressure. The Commission investigated Brown's individual charge and the possibility that Local 745 had engaged in systematic coercion in violation of 2 U.S.C. § 441b(b)(3)(A). Ultimately, however, on January 17, 1979, the Commission's General Counsel submitted a ten-page report recommending that the FEC find "no reasonable cause to believe" that Local 745 had contravened the Act. On January 31, the Commission, without independently stating reasons for its action, accepted the General Counsel's recommendation. On February 6, the General Counsel informed Brown by letter that the agency "intend[ed] to close its file in this matter."

Brown thereupon sought judicial review. *See* 2 U.S.C. § 437g(a)(8)(A) (Supp. IV 1980) (previously codified at 2 U.S.C. § 437(a)(9)(A) (1976)). Although the Commission candidly concedes that "[its] decisions are not necessarily based on or in agreement with the analysis of the General Counsel," Brief for Appellee at 30, the district court concluded that the staff report "may be viewed" as the Commission's statement of reasons. Granting summary judgment to the FEC, the court determined that the report sufficed to show that the dismissal of Brown's administrative complaint was not arbitrary, capricious, or contrary to law.

On appeal, Brown vigorously contends that the Commission's unadorned finding of "no reasonable cause to believe" affords an inadequate basis for informed judicial review. While the statement of reasons provision of the

Administrative Procedure Act, 5 U.S.C. § 555e, and the enforcement mechanisms of the Federal Election Campaign Act, 2 U.S.C. § 437g (1976 & Supp. IV 1980), might be read to support Brown's position, *cf. Dunlop v. Bachowski*, 421 U.S. 560, 571-74 (1975), the Supreme Court, in a decision handed down subsequent to oral argument in this case, *FEC v. Democratic Senatorial Campaign Committee*, 50 U.S.L.W. 4001 (U.S. Nov. 10, 1981) has ruled otherwise. The Court determined that the General Counsel's report, although not expressly adopted by the Commission, constitutes sufficient grounds to support a decision to dismiss an administrative complaint.

Citing and quoting from *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court emphasized in *Democratic Senatorial Campaign Committee* that Congress has entrusted to the FEC extensive powers and broad responsibility with respect to the administration and enforcement of the Federal Election Campaign Act. The Commission, the Court instructed, "is precisely the type of agency to which deference should presumptively be afforded." 50 U.S.L.W. at 4004. The Court indicated specifically that the deference due to the Commission is not diminished because it is the FEC's customary practice, when it dismisses a complaint, to refrain from expressly adopting its General Counsel's report and from stating reasons of its own. *See id.* at 4004 n.19. The absence of reasons supplied or adopted by the Commission itself, the Court concluded, does not deprive a reviewing court of an informed basis on which to ground a deferential decision. *Id.* We must therefore assume, "[e]ven without an express statement" from the FEC, that "the staff report" underpins its action. *Id.* The General Counsel's report in the case at hand, we conclude, particularly when considered in the context of the large discretion the Commission has to determine whether or not a civil violation of the Act has occurred, is sufficiently reasonable to be accepted by this Court. *See id.* at 4004.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

Civil Action No. 79-00940

No. 80-2108

ARCHIE E. BROWN,

Appellant

v.

FEDERAL ELECTION COMMISSION, *et al.*

Argued 10-23-81

Before: Robinson, Chief Judge; Wright, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, Circuit Judges

ORDER

Appellant's suggestion for rehearing *en banc* has been circulated to the full Court and no member of the Court has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER,
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Filed Jan. 15, 1982

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

Civil Action No. 79-00940

No. 80-2108

ARCHIE E. BROWN,

Appellant

v.

FEDERAL ELECTION COMMISSION, *et al.*

Before: McGowan, Senior Circuit Judge; Ginsburg, Circuit Judge and Philip Nichols, Jr.,* Judge, United States Court of Claims

ORDER

On consideration of appellant's petition for rehearing, filed December 23, 1981, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER,
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Filed Jan. 15, 1982

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* Sitting by designation pursuant to Title 28 U.S.C. § 293(a).

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-0940

ARCHIE E. BROWN,

Plaintiff,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

MEMORANDUM

This action is a judicial review of a decision by the Federal Election Commission ("Commission") not to pursue an alleged violation of the Federal Election Campaign Act of 1971, *as amended*, 2 U.S.C. § 431 *et seq.* (the "Act"). Defendant has moved for summary judgment. For the reasons set forth below, the Court concludes that there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law.

BACKGROUND

Plaintiff alleges that in late 1976 he was denied membership in Local 745 of the International Brotherhood of Teamsters, Chauffeurs, and Warehousemen and Helpers of America ("Teamsters") because he refused to contribute to and join the Democratic Republican Independent Voter Education ("DRIVE"), an organization which supports pro-labor political candidates.[1] In June, 1977, plaintiff filed with the Commission a complaint alleging that Teamster officials at Local 745 had violated 2 U.S.C. § 441b (1976) by attempting to coerce him to contribute

[1] Local 745 officials state that plaintiff's membership was denied because his union dues at his last local were in arrears and that he was eventually admitted to Local 745 when the dues were paid. Exhibits 14 and 16 submitted with Defendant's Motion for Summary Judgment.

to DRIVE. Upon receipt of the complaint the Commission determined that there was reason to believe that a violation of the Act had been committed and commenced an extensive investigation.[2] In early 1979, the Commission, upon the recommendation of its General Counsel who had reviewed the results of the investigation, found no reasonable cause to believe there had been a violation of the Act and dismissed the complaint.[3] It is this latter decision which plaintiff alleges was arbitrary, capricious, and contrary to law.

DISCUSSION

It is clear that Congress has conferred jurisdiction on the courts to interfere with the Commission's actions only when they are contrary to law. 2 U.S.C. § 437g(a)(9)(C) (1976). As was stated in *In re Federal Election Campaign Act Litigation*, 474 F. Supp. 1044 (D.D.C. 1979), the question raised in these cases is whether, in light of all the evidence available to the Commission, the decision was arbitrary or capricious. The parties agree that this is the proper evidentiary standard for review.

A principal issue, however, is what constitutes the administrative record. Plaintiff contends that it is every document the Commission has obtained or created with respect to the investigation as well as other information related thereto. This is incorrect. In the classic case of *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), the Supreme Court remanded the case for judicial review "to be based on the full administrative record *that was before the Secretary at the time he made his decision.*" 401 U.S. at 419-20 (emphasis added). One familiar with administrative agency practice recognizes that top decisionmakers are provided with a file prepared by agency staff which seldom if ever includes every piece of paper collected in the course of a particular matter.

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[2] *See* 2 U.S.C. § 437g(a)(2) (1976).

[3] *See* 2 U.S.C. § 437g(a)(5)(A) (1976).

In the instant case the Commission decision failed to state what the Commissioners considered. Pursuant to a Court Order, defendant, by certification of the Secretary to the Commission, has indicated that the Commissioners had before them the General Counsel's Report[4] when they found no reasonable cause to believe a violation of the Act had occurred. Defendant has indicated further that the complete permanent file was available to each Commissioner. This is not to say, however, that because the entire file was available to the Commissioners that it is the administrative record for purposes of judicial review. It is presumed that agency heads have access to the entire file of all matters processed by their staffs. To repeat, the administrative record for purposes of judicial review is that which the decisionmakers consider in making a decision. In this case it is the General Counsel's Report.

Plaintiff also alleges that the Commissioners erred in not stating reasons for their decision as required by *Dunlop v. Bachowski*, 421 U.S. 560 (1975). This very issue was raised in this District in *Hampton v. Federal Election Commission*, Fed. Elec. Camp. Fin. Guide (CCH), ¶ 9036 at 50, 439-40 (D.D.C. 1977), *aff'd*, No. 77-1546 (D.C. Cir. July 21, 1978) (unpublished opinion). In that case Judge Parker held that the statement of reasons provided in the General Counsel's Report sufficiently demonstrated that the Commission did not act arbitrarily or capriciously. The Commissioners in that case incorporated into their decision the statement of reasons in the General Counsel's Report. The same may apply to the case at bar.

It having been determined, then, that the administrative record for purposes of review is the General Counsel's Report and that the reasons stated in that report may be viewed as those of the Commissioners, it is now

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[4] Exhibit 21 submitted with Defendant's Motion for Summary Judgment.

necessary to determine whether the statement of reasons is sufficient and whether the decision not to pursue plaintiff's complaint was arbitrary or capricious. The ten page General Counsel's Report discusses the results of the investigation. It includes a synopsis of the depositions taken of the officials of Local 745. It also includes a statistical analysis of DRIVE contributors at Local 745 to show the improbability of plaintiff's allegation. The report clearly indicates that plaintiff's membership in Local 745 was denied because his union dues were unpaid, not because he refused to contribute to DRIVE. These reasons are sufficient to support the Commission decision and they show that the action to dismiss the complaint was not arbitrary, capricious, or contrary to law.

The Court notes that much of this litigation would have been avoided had the Commissioners indicated in their decision the matters they considered and the reasons for their action. A brief statement that they had before them for consideration the General Counsel's Report and that they adopted his reasons as their own would have sufficed.

CONCLUSION

Upon review of the administrative record, the Court concludes that the Commission decision finding no probable cause to believe that a violation of the Federal Election Campaign Act had occurred was not arbitrary, capricious, or contrary to law. Accordingly, there being no genuine issue as to any material fact, defendant's motion for summary judgment is granted, and summary judgment for defendant and against plaintiff is entered.

/s/ Oliver Gasch
OLIVER GASCH
Judge

Date: July 17th, 1980

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-0940

ARCHIE E. BROWN,
Plaintiff,
v.
FEDERAL ELECTION COMMISSION,
Defendant.

ORDER

Upon consideration of defendant's motion for summary judgment, the memoranda submitted in support thereof and in opposition thereto, the argument of counsel in open Court, and the entire record herein, and for the reasons stated in the accompanying Memorandum of this same date, it is by the Court this 17th day of July, 1980,

ORDERED that defendant's motion for summary judgment be, and hereby is, granted; and it is further

ORDERED that summary judgment be, and hereby is, entered in favor of defendant and against plaintiff.

/s/ Oliver Gasch
OLIVER GASCH
Judge

APPENDIX D

BEFORE THE FEDERAL ELECTION COMMISSION

MUR 412

IN THE MATTER OF

LOCAL 745 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

CERTIFICATION

I, Majorie W. Emmons, Secretary of the Federal Election Commission, certify that on January 31, 1979, the Commission, meeting in an executive session at which a quorum was present, determined by a vote of 4-0 to take the following actions in MUR 412:

1. Find no reasonable cause to believe that the Teamsters Local 745 violated 2 U.S.C. § 441b.
2. Notify the respondent and the complainant.

Commissioners Aikens, McGarry, Thomson, and Tiernan voted affirmatively for the determination. Commissioner Springer recuses in MUR 412 and was not present at the time of the vote. Commissioner Harris was not present at the time of the vote.

Attest:

/s/ Marjorie W. Emmons
MARJORIE W. EMMONS
Secretary to the Commission

2/5/79
Date

FEDERAL ELECTION COMMISSION
[SEAL] 1325 K. Street N.W.
Washington, D.C. 20463

February 6, 1979

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Archie E. Brown
1439 Whitely Drive
Dallas, Texas 75217

RE: MUR 412 (77)

Dear Mr. Brown:

On January 31, 1979, the Commission voted to find no reasonable cause to believe that Local 745 of the International Brotherhood of Teamsters has violated 2 U.S.C. § 441b.

Accordingly, the Commission intends to close its file in this matter.

Sincerely

/s/ William C. Oldaker
WILLIAM C. OLDAKER
General Counsel

APPENDIX E

BEFORE THE FEDERAL ELECTION COMMISSION

MUR 412 (77)

IN THE MATTER OF

LOCAL 745 (DALLAS, TEXAS)

CERTIFICATION

I, Marjorie W. Emmons, Secretary to the Federal Election Commission, do hereby certify that on June 27, 1977, the Commission adopted the General Counsel's recommendation to find reason to believe that a violation of 2 U.S.C. Section 441b has been committed by Local 745 of the International Brotherhood of Teamsters in the above-captioned matter.

/s/ Marjorie W Emmons
MARJORIE W. EMMONS
Secretary to the Commission

APPENDIX F

2 U.S.C. § 437g (1976). *Enforcement*

(a) (1) Any person who believes a violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954 has occurred may file a complaint with the Commission. Such complaint shall be in writing, shall be signed and sworn to by the person filing such complaint, and shall be notarized. Any person filing such a complaint shall be subject to the provisions of section 1001 of Title 18, United States Code. The Commission may not conduct any investigation under this section, or take any other action under this section, solely on the basis of a complaint of a person whose identity is not disclosed to the Commission.

(2) The Commission upon receiving any complaint under paragraph (1), and if it has reason to believe that any person has committed a violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954, or, if the Commission, on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, has reason to believe that such a violation has occurred, shall notify the person involved of such alleged violation and shall make an investigation of such alleged violation in accordance with the provisions of this section.

(3) (A) Any investigation under paragraph (2) shall be conducted expeditiously and shall include an investigation, conducted in accordance with the provisions of this section of reports and statements filed by any complainant under this title, if such complainant is a candidate.

(B) Any notification or investigation made under paragraph (2) shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made.

(4) The Commission shall afford any person who receives notice of an alleged violation under paragraph (2), a reasonable opportunity to demonstrate that no action should be taken against such person by the Commission under this Act.

* * * *

(9) (A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure on the part of the Commission to act on such complaint in accordance with the provisions of this section within 90 days after the filing of such complaint, may file a petition with the United States District Court for the District of Columbia.

(B) The filing of any petition under subparagraph (A) shall be made—

(i) in the case of the dismissal of a complaint by the Commission, no later than 60 days after such dismissal; or

(ii) in the case of a failure on the part of the Commission to act on such complaint, no later than 60 days after the 90-day period specified in subparagraph (A).

(C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the action, or the failure to act, is contrary to law and may direct the Commission to proceed in conformity with such declaration within 30 days, failing which the complainant may bring in his own name a civil action to remedy the violation involved in the original complaint.

(10) The judgment of the district court may be appealed to the court of appeals and the judgment of the court of appeals affirming or setting aside, in whole or in part, any such order of the district court shall be final,

subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28, United States Code.

* * * *

2 U.S.C. § 441b. Contributions or expenditures by national banks, corporations or labor organizations

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or for any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b) (1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section, and section 12(h) of the Public Utility Holding Company Act

(15 U.S.C. 79*l*(h)), the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section; but shall not include—

(A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject;

(B) non-partisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and

(C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

(3) It shall be unlawful—

(A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other monies required as a condition of membership in a labor organization

or as a condition of employment, or by monies obtained in any commercial transaction.

(B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and

(C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at the time of such solicitation, of his right to refuse to so contribute without any reprisal.

* * * *

APPENDIX G

BEFORE THE FEDERAL ELECTION COMMISSION

MUR 412

IN THE MATTER OF

LOCAL 745 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

GENERAL COUNSEL'S REPORT

BACKGROUND

This matter involves a complaint submitted by Archie E. Brown who alleges that a violation of 2 U.S.C. § 441b has been committed by Local 745 of the International Brotherhood of Teamsters. Mr. Brown states that when he attempted to transfer his union membership from Teamsters Local 886 in Oklahoma to Local 745 in Texas, he was required to sign a "voluntary" contribution card to join DRIVE (Democratic Republican Independent Voter Education). He declined to contribute and was denied membership in the local.

On June 24, 1977, the 48 hour General Counsel's report recommending reason to believe a violation of § 441b had occurred, was circulated on a 24 hour no objection basis. No objections were submitted; the notification letters were sent on July 6, 1977.

Counsel for Local 745 responded to the Commission's notification by stating that "less than ⅓ of the 12,000 to 14,000 members of the local are members of DRIVE."

Mr. Brown submitted to us a list of individuals who were also allegedly pressured to join DRIVE or who had specific knowledge of Mr. Brown's accusations. Those

individuals were contacted via letter, phone, and some were interviewed later in Dallas.

On September 7, 1977, the president of the local was issued a subpoena for documents in connection with membership in the DRIVE chapter of Local 745. The local was not able to supply us with most of the information requested. We then subpoenaed those records from Trans Con, Lee Way Motor Freight, and East Texas Motor Freight, trucking companies in the Dallas area which employ members of Local 745.

From January 8th through January 13, 1978, a field investigation was conducted in Dallas, Texas. Union officials, union office personnel, attorneys, and witnesses were interviewed.

On March 14, 1978, union officials and office personnel were subpoenaed for deposition to be taken on April 6 and 7, 1978. On that same date, an order was issued to Local 886 to answer questions in connection with Mr. Brown's transfer to Local 745.

On April 6 and 7th, depositions of union officials and personnel were taken, at which time we were informed by the respondent that the subpoenaed records in connection with the depositions would not be made available to us.

On May 1, 1978, the Commission filed a petition for a show cause order in connection with the union's refusal to supply us with subpoenaed records.

After a period of negotiation, a stipulation was entered into by the respondent and the Commission, in which the respondent agreed to make available the documentation required by the subpoena for deposition, plus additional information. The Commission agreed to dismiss its petition for a show cause order, contingent upon the respondent satisfying the stipulation. Because of the laboriousness of compiling the information sought by the Commission, which consisted of extracting categories of

information from a computer tape and re-compiling these categories manually in order to provide cross references, the respondent was given sixty days to provide the information. On August 29, 1978, the respondent provided the required information.

EVIDENCE/ANALYSIS

As noted previously, this matter was instigated by a complaint which alleged that Teamsters Local 745 had employed coercion to obtain a "voluntary contribution" to its political action committee D.R.I.V.E., in violation of 2 U.S.C. § 441b(b)(3)(A). The complainant referred staff to other persons who he alleged had also suffered coercion from Local 745 in connection with its political efforts. For this reason as well as because it appeared that the alleged coercion, if true, would have been applied generally, the staff gathered and analyzed systemic evidence as well as that pertaining to Mr. Brown's individual complaint. Since the § 441b(b)(3)(A) systemic issue could have merit irrespective of the merits of Mr. Brown's complaint, an analysis of the two will be presented separately below.

A. *Complaint of Archie E. Brown*

Mr. Brown stated in his complaint that "on or about the first day of October 1976" he requested that a transfer be mailed to him from Local 745; at the time Brown requested the transfer, he was a member of Local 886. Local 745 mailed Brown a transfer along with a check-off form for his union dues which he signed and mailed to the local. Brown said he went to the union hall on December 30, 1976 to find out why his dues had not been deducted. According to Brown, a woman at the dues window told him that the reason was that he had failed to sign the DRIVE check-off which had been enclosed with the transfer. Brown refused, and the woman called Charles Rogers, President of Local 745, to speak with Brown. Rogers allegedly told him he must join DRIVE if he wanted to

join the local. Rogers looked at Brown's file and instructed a woman to call Local 886. He then took Brown to see George Prda, Vice President of Local 745. According to Brown, Prda told Brown that if he didn't join DRIVE, he would have to stay in Local 886.

Local 745 union officials, with regard to Brown's specific allegation, contend that Brown was denied a transfer from Local 886 to Local 745 because he was delinquent in his dues, not because of his refusal to join DRIVE.

Charles Rogers has stated, under oath, that he instructed a woman in the dues office to call Local 886 because Brown's ledger card indicated he had been suspended three times from Local 745 for nonpayment of dues. Local 886 informed Rogers that Brown was currently delinquent in his dues at their local. For that reason, Rogers stated, Brown was denied membership.

Local 886, in response to a Commission order, has indicated that it does not recall receiving a phone call from Local 745; however, their records indicate that Brown was a member of Local 886 during 1976 and that he failed to pay his dues for over three months. It is the policy of Local 886 to suspend a member for non-payment of dues for three months or more. It appears that Brown was suspended from Local 886 *on* December 30, 1976, when the alleged incident at Local 745 took place.

B. *Systemic Coercion*

Although Local 745 officials contend they do not force members to join DRIVE, they have stated that if a person refuses to join DRIVE at the time of membership application, they must speak to a business agent or union official in order that the DRIVE fund be explained to them.

The Commision, in AO 1976-23, set out three guidelines to "minimize the appearance or perception of coercion."

(a) The solicited employee must be informed of the political purpose of the PAC.

(b) No superior should solicit a subordinate.

(c) The employee should be informed of his right to refuse to contribute without reprisal.

Union officials have stated under oath that each individual who speaks with them concerning DRIVE is advised of the political purpose of the fund. The DRIVE authorization form clearly states that the fund is voluntary. Thus, two out of the three criteria are satisfied, even though there is clearly a superior/subordinate relationship between the applicant and the union officials with whom he speaks. Therefore, although union membership is not expressly conditioned upon the making of a political contribution, the solicitation process appears to perhaps create a coercive climate which could cause an applicant for union membership to think that he had to also join D.R.I.V.E.

Since it was not practical to interview a representative sample of the union's membership, we decided to use statistics as a basis for our analyzation. There is authority, although inverse, in *Pipefitters* (footnote 30 at 407 US 418) for the concept that instance of mandatory assessment of contributions can be proven statistically. In other words, if we could demonstrate that the union membership overwhelmingly contributed to DRIVE, then the courts might infer that, without coercion, indirect or otherwise, such a high percentage of voluntary contributions would not occur. We also considered that a statistical analysis to determine whether or not there was systemic coercion would be probative of Mr. Brown's complaint, too.

The local supplied us with the following statistics:

(a) The total number of union members;

(b) The total number of DRIVE members;

(c) The total number of union and DRIVE members broken down by companies which employ Local 745 members.

An analysis of the total number of inactive members, casuals and members employed at companies which do not participate in the DRIVE check-off [1] subtracted from the total number of union members indicates that 45% of those eligible to join DRIVE are in fact members.

During the course of our investigation, we became aware of the possibility that perhaps those individuals who join the local at the union hall rather than through the mail or at their place of employment could possibly be more likely to join DRIVE in light of the fact that they would come in contact with union officials. Statistics showing a higher incidence of DRIVE contributors through the union hall could modify the statistical inference indicated by the fact that, overall, only 43% of the union membership had joined DRIVE. However, statistics regarding whether a person joins the union and DRIVE at the union hall or through the steward at the job site are not available.

The statistics furnished to this office by the union indicate that some companies, party to a collective bargaining agreement with Local 745, have a relatively large number of union members who are also DRIVE members, while others do not. However, there does not appear to be a clear explanation for this. We pursued a couple of

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[1] *Inactive members*: Either deceased, retired, suspended, or withdrawn. *Casual members*: Part time employees who do not have deductions automatically withheld from pay checks because they do not have permanent jobs. Therefore, membership dues and DRIVE contributions would have to be paid in cash.

Companies which do not participate in DRIVE: Some companies which are party to a collective bargaining with Local 745 do not participate in the DRIVE check-off, so in order for one of their employees to be a member of DRIVE he would have to pay the union in cash.

theories which could have explained the variance in DRIVE members per company and which could have been probative of coercion.

First, a member's proximity to the union hall, either from the location of his residence or his place of employment, might explain the variance in DRIVE membership per company because of the greater likelihood of that person's applying through the union hall rather than at the job site or by mail. However, the data to determine this theory was not available.

Second, we learned through depositions that some companies participate in the DRIVE check-off procedure while others do not. This evidence suggested the possibility that those participating companies might have a higher number of DRIVE members. However, the evidence provided by the union does not indicate a consistent pattern between participating and non-participating companies.

It should be noted that there are several problems inherent in analyzing the statistics which we have received from the local. First, there is a possibility that the statistics submitted by the union may be incorrect. Second, the number of DRIVE members is separate from the total number of individuals who have signed DRIVE authorization cards. In other words, while a union member may sign the authorization card, if the annual deduction has not or is not currently being made, that person is not considered to be a member of DRIVE. This means that all casual members (see footnote 1) who may have signed an authorization card but have not contributed to the fund, are not included in the totals. The same is true for those who have signed authorizations for DRIVE subsequent to October of 1977 because they have not yet contributed to DRIVE. (The annual deduction takes place in the fall of each year.)

Therefore, the fact that only 45% of all Local 745 members belong to DRIVE is misleading in that an unknown

number have authorized the local to deduct $5.00, but for some reason may not have effectuated the transfer of funds. However, even allowing for this discrepancy, there would still be a considerable difference between the percentage of all union members and the percentage of union members belonging to D.R.I.V.E.

CONCLUSION

As set forth in 2 U.S.C. § 441b(b)(3), it is unlawful for a separate segregated fund of a labor organization "to make a contribution or expenditure [in connection with federal elections] by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal, or by dues, fees or other monies required as a condition of membership in a labor organization . . ." 11 CFR 114.5(a) further provides that ". . . For purposes of this section, fees or monies paid as a condition of acquiring or retaining membership or employment are monies required as a condition of membership even though they are refundable upon request of the payor."

The investigation of Local 745 does not establish that the union obtained contributions to DRIVE through coercion or threat of coercion. There is no evidence whatever of physical coercion. With respect to economic coercion or the threat thereof, although by the union officials' own admission there has been an almost 100% success rate of DRIVE commitments from those applying for membership at the union hall, it can be argued that the business agents were merely very persuasive, in the absence of any evidence to establish the economic leverage the union might have over an applicant for membership. If Local 745 ran a hiring hall which referred its members to jobs, this would be a factor, although not a necessarily determining factor, in indicating the union's economic leverage over its members. However, Local 745 does not operate a

hiring hall. Another factor which is some indicator of a union's strength is whether it operates in a closed shop state or is subject to right-to-work laws. Texas is a right-to-work state. A statistical profile showing an overwhelmingly large number of DRIVE commitments by the membership might have rebutted the two previously stated factors which argue against coercion, since a union may have very real, if not declared, power in the job market, despite its operating in a right-to-work state and having no hiring hall. However, as we have discussed, we were not able to obtain statistics that could prove a theory of coercion.

With regard to Mr. Brown's specific allegation, it does not appear that there is reasonable cause to believe Local 745 violated 2 U.S.C. § 441b. While both parties admit that the subject of DRIVE was mentioned on December 31st, the local contends that it was Brown's delinquent dues status which caused the denial of his transfer request. Brown's dues status coupled with the local's membership decision not to allow Brown's transfer, leads us to believe that the local's denial of Brown's application was not based on his refusal to join DRIVE.

RECOMMENDATION

1. Find no reasonable cause to believe that the Teamsters Local 745 violated 2 U.S.C. § 441b.

2. Notify respondent and complainant.

WILLIAM C. OLDAKER
/s/ William C. Oldaker
General Counsel

1/16/79
Date

APPENDIX H

Federal Election Commission
1325 K. N.W.
Washington, D.C.
Case Number Em- 010

May 30, 1977

Archie E. Brown
1439 Whitley Dr.
Dallas, Texas 75217
Phone no. 214-391-4797

Dear Ms. Callahan

Reference is made to the letter addressed to me, by Mr. William C. Oldaker, General Counsel regarding difficulties in transferring from Teamsters Local 886 of the International Brotherhood of the Teamsters, to Local 745 of the International Brotherhood of the Teamsters, and the political arm of this organization, going under the name of D.R.I.V.E.

It is my contention the employees, agents, and representatives of the Teamster Union number 745, are in violation of the Federal Election Campaign Act of 1971, and in violation of 2- U.S.C. 441b of the act, that portion which deals with solication, of members contributions, as a condition of membership in a labor organization.

Please accept this statement as official charges under the above named section of the act.

On or about the first day of October 1976, I requested a Transfer to be mailed to my home from local 745 Teamsters. I was, and still am a member of Local 886 in Oklahoma City, Okla. Pleas note that I was laid off from my job at Trans/Con lines in Oklahoma City, and Asked to bump or go to Dallas to work for the same company. Trans/Con did honor my request, and as the International Teamsters constit ution reads, I am suppose to belong to Dallas Local 745 in order to work in this area. As I stated, Local 745 did mail me a transfer to my home already typed out, alone with a check off for my union dues to be taken out of my pay at Trans/Con. I signed both the transfer and the check off, and mailed back to local 745 in a self addressed envelope.

I then assumed as the normal procedure is that my dues would be taken out. I waited from October to December 1976, and my dues were not taken out of my check like the other employees at Trans/Con.

I went down to the Union hall on Dec. 20, 1976 and asked the girl at the dues window why they were not taken my union does out. She informed me that I had failed to sign the DRIVE check off, that was inclosed with my Transfer. I told her I did not care to join DRIVE at this time. She said, "but you gotta" I said, "I don't gotta do nothing." She then called the President of the local over, A Mr. Charles Rogers. He asked, whats the trouble. The girl said that I was refusing to sign for DRIVE. Mr. Rogers said, "if you want to belong to thie GOD-DAM local you will." I still refused, he got my file which was on the girls desk, and told her to call Oklahoma City. I had my money out to pay my union dues and the girl was about to take it, after she got off the phone, and I said, it made him mad, didn't it. Mr. Rogers overheard me, and said, you GOD-Dam right, and you want get into this local either. He then said, "come on lets go see Prda." (George Prda is the Vice President of this local and also a business agent).)

We went to Prda's Office and he asked what the trouble was. I told him I did not want to join DRIVE this time. Mr. Prda said, pounding his fists on the side of the desk, "you will sign this DRIVE card, or keep your ass in local 886. I noticed another employee of Lee Way Motor Freight, who I knew, sitting in a chair, a Mr. Finey. He over heard the conversation. Since then I have not been able to locate him. After some more harrassment and abuse by others in Mr. Prda's office, I finally said what you all are doing is illegal. I asked another man who was sitting there what his name was, he said, none of your GOD- Dam business. I found out later his name was Garland Moore. I then left the union hall. This is what happened.

If you will check with the F.B.I. Agent Bill Grimmer in Dallas, you will find other things that has happen to me in the last few months. Also ask any member in this area of the Teamsters that don't have a official connection with the local , and you will find others have went through the same thing.

Sworn before me on the 3rd day of June, 1977 in Nolan County.

Archie E. Brown
/s/ Archie E. Brown

/s/ Kay Kropp , Notary
Kay Kropp, Notary Public

[Note: typographical errors appear in original]

Opposition

Office - Supreme Court, U.S.
FILED
MAY 14 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1905

In the Supreme Court of the United States

OCTOBER TERM, 1981

ARCHIE E. BROWN, PETITIONER,

v.

FEDERAL ELECTION COMMISSION, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

CHARLES N. STEELE *
General Counsel

RICHARD B. BADER
Assistant General Counsel

SONDRA L. MILLS
Attorney

FEDERAL ELECTION COMMISSION
1325 K Street, N.W.
Washington, D.C. 20463
(202) 523-4143

* Counsel of Record

May 14, 1982

QUESTIONS PRESENTED

1. Whether the court of appeals erred by following this Court's recent unanimous ruling in *Federal Election Commission* v. *Democratic Senatorial Campaign Committee*, —— U.S. ——, 102 S.Ct. 38 (Nov. 10, 1981), that the General Counsel's report to the Commission provides a sufficient basis for judicial review of the Commission's dismissal of an administrative complaint.

2. Whether the court of appeals erred by concluding that the Commission did not act contrary to law in dismissing petitioner's administrative complaint, where there was insufficient evidence to support the allegations in the complaint.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1905

ARCHIE E. BROWN, PETITIONER,

v.

FEDERAL ELECTION COMMISSION, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals is published at 672 F.2d 893 (D.C. Cir. 1981) (table) and appears in the appendix to petitioner's brief ("Pet. App.") at 1a. The orders of the court of appeals denying a petition for rehearing and suggestion for rehearing *en banc* are set forth at Pet. App. 4a-5a. The memorandum opinion and order of the district court are unpublished and are set forth at Pet. App.

6a-10a. The district court held that the Commission did not act contrary to law when it dismissed the administrative complaint filed by petitioner. The unanimous determination of the Commission dismissing petitioner's administrative complaint appears at Pet. App. 11a. The Commission's General Counsel's Report is set forth at Pet. App. 19a-27a.

JURISDICTION

The judgment of the court of appeals was entered on November 20, 1981. On January 15, 1982, the court denied petitioner's petition for rehearing *en banc*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant statutory provisions are set forth at Pet. App. 14a-18a.

COUNTERSTATEMENT OF THE CASE

A. The Commission's Investigation

Petitioner Archie E. Brown filed an administrative complaint with the Commission on June 7, 1977, alleging that employees, agents and representatives of Local 745 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Local 745") had violated 2 U.S.C. § 441b, a provision of the Federal Election Campaign Act of 1971, as amended ("FECA" or "the Act"), which prohibits, *inter alia*, coercing employees or union members to contribute to a political committee maintained by a corporation or union. *See* 2 U.S.C. § 441b(b)(3)(A). Specifically, Brown asserted that when he attempted to transfer his union membership

from Teamsters Local 886 in Oklahoma to Local 745 in Texas, he was informed that he was required to sign a contribution card to join DRIVE (Democratic Republican Independent Voter Education).[1] Brown alleged that he was denied membership in Local 745 because he refused to join DRIVE. He also stated that he believed others in that "area" of the Teamsters union had undergone similar experiences. Pet. App. 30a.

On June 27, 1977, the Commission adopted the General Counsel's recommendation that the Commission find reason to believe that Local 745 had violated 2 U.S.C. § 441b, notified Local 745 of the complaint and the Commission's reason to believe finding, and commenced an investigation to determine whether there was evidence to support Brown's allegation that Local 745 had attempted to coerce him to contribute to DRIVE. Because it appeared that the alleged coercion, if true, might have been applied generally, the Commission also attempted to determine whether there was evidence to indicate the existence of systematic coercion throughout Local 745. Pet. App. 21a. The ensuing investigation spanned approximately eighteen months, throughout which Local 745 vigorously contended that Brown had been denied membership because his dues were in arrears at Local 886, not because he refused to join DRIVE. Pet. App. 22a. In the course of several field interviews in Dallas, Texas, the investigators interviewed or deposed union officials and personnel, as well as those individuals who Brown claimed were also pres-

[1] DRIVE is the separate segregated fund for political contributions and expenditures established and maintained by the International Brotherhood of Teamsters pursuant to 2 U.S.C. § 441b(b)(2)(C).

sured to join DRIVE or who had specific knowledge of his allegations. Pet. App. 19a-20a. In addition, the Commission took all reasonable steps, including the institution of a subpoena enforcement action, to secure the necessary data from Local 745 and the relevant employers regarding membership in the DRIVE chapter of Local 745. Pet. App. 20a-21a.

After a thorough examination and analysis of all the information gathered during the course of its investigation, the General Counsel's Office prepared a report, submitted to the Commission on January 17, 1979, recommending that the Commission find "no reasonable cause to believe" that Local 745 violated the Act and close the file on the investigation. Pet. App. 19a-27a. Summarizing the evidence obtained during the investigation, the General Counsel found nothing to support Brown's allegation that he was told that he could not transfer to Local 745 unless he first would agree to join DRIVE. To the contrary, the General Counsel concluded that the available evidence supported Local 745's contention that Brown was denied a transfer from Local 886 to Local 745 because he was delinquent in his dues. With respect to the possible existence of systematic coercion by Local 745, the General Counsel, citing *Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385, 418 n.30 (1972), observed that it might be possible to draw a statistical inference of coercion if a high enough percentage of Local 745 members were also DRIVE contributors. However, an analysis of the available statistical evidence indicated that only 45% of Local 745 members contributed to DRIVE. Pet. App. 23a-25a. The General Counsel also noted that Local 745's ability to exert economic coercion is diminished because it has no hiring hall and operates in

a state which does not permit union security agreements. Pet. App. 26a-27a.

In light of the lack of evidence to support Brown's allegation that he was denied membership in Local 745 because he refused to join DRIVE, or to indicate that Local 745 generally solicited its membership for contributions to DRIVE in a coercive fashion, the General Counsel recommended that the Commission find no "reasonable cause to believe" that Local 745 had violated the Act.[2] On January 31, 1979, the Commission voted unanimously to follow the General Counsel's recommendation. Pet. App. 11a.

B. The Proceedings Before the District Court

Pursuant to former 2 U.S.C. § 437g(a)(9),[3] on April 2, 1979, Brown filed suit in district court for review of the Commission's dismissal of his complaint, alleging that the Commission's investigation was not fully and properly carried out, that con-

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[2] During the pendency of this litigation, Congress enacted certain amendments to FECA. Pub. L. No. 96-187, 93 Stat. 1339 (effective January 8, 1980). Pursuant to these amendments, the "reasonable cause to believe" stage formerly set forth at 2 U.S.C. § 437g(a)(5)(A) was eliminated, thereby abbreviating the Commission's enforcement procedure from a three-step to a two-step procedure. A finding of "reasonable cause to believe" under the pre-1980 Act is essentially equivalent to a finding of "probable cause to believe" under the Act in its present form (*see* 2 U.S.C. § 437g(a)(4)) since both findings follow the investigative stage but precede the mandatory conciliation stage. All references in this brief are to the pre-1980 Act as set forth at Pet. App. 14a-18a.

[3] As a result of the 1980 amendments to the Act, *see* fn.2, *supra*, the judicial review provision formerly contained in 2 U.S.C. § 437g(a)(9) was renumbered and is now set forth at 2 U.S.C. § 437g(a)(8).

siderations other than the merits of his complaint were taken into account in dismissing the complaint, that the Commission had failed to state any findings of fact or reasons for the dismissal of his complaint, and that unlawful *ex parte* communications had occurred.[4] In his complaint, Brown asked the district court to declare that the Commission's dismissal of his administrative complaint was arbitrary, capricious and contrary to law, to declare that Local 745 had violated 2 U.S.C. § 441b, and to compel the Commission "to carry out [its] statutory dut[y] to prevent or correct the injury to the plaintiff and the public caused by the alleged unlawful acts of defendant Teamsters."

Brown sought extensive discovery into the details of the Commission's investigation, including interrogatories, a request for production of every document, including informal staff drafts and notes, which related in any way to his complaint, and depositions of the Chairman of the Commission and an administrative assistant in the Office of General Counsel. The Commission objected to this discovery on the ground that it was beyond the proper scope of review under 2 U.S.C. § 437g(a)(9) and moved for summary judgment. The district court denied all discovery, except to clarify what was before the Commissioners when they found no reasonable cause to believe that Local 745 had violated the Act. In response, the Commission stated that the General Counsel's report summarizing the results of the investigation, which had already been submitted to the Court, was the only document before the Commission when it voted to dismiss Brown's complaint.

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[4] Brown has never offered any explanation whatsoever for this last allegation.

On July 17, 1980, the district court granted the Commission's motion for summary judgment. The court held that the proper scope of review is whether the Commission's decision was arbitrary, capricious or contrary to law, based on the administrative record that was before the Commissioners at the time of their decision. The court further held that the General Counsel's report, the only document before the Commission when it made its decision, constituted an adequate basis for judicial review of the Commission's decision since the Commission followed the recommendation in the report. Upon reviewing the General Counsel's report in this case, the court concluded that the report "clearly indicated" that the Commission's dismissal of Brown's complaint was not arbitrary, capricious or contrary to law. Pet. App. 9a.

C. The Decision of the Court of Appeals

On appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed the judgment of the district court. Pet. App. 1a. In an accompanying memorandum, the court of appeals followed this Court's recent decision in *FEC* v. *Democratic Senatorial Campaign Committee*, —— U.S. ——, 102 S. Ct. 38 (Nov. 10, 1981), which held that the General Counsel's report, although not expressly adopted by the Commission, provides a sufficient basis for judicial review of a decision to dismiss an administrative complaint. *Id.* at 45 n.19. The court of appeals then concluded that the General Counsel's report in this case, "particularly when considered in the context of the large discretion the Commission has to determine whether or not a civil violation of the Act has occurred, is sufficiently reasonable to be accepted by this Court". Pet. App. 3a.

On January 15, 1982, the court of appeals denied Brown's petition for rehearing and suggestion for rehearing *en banc*. Pet. App. 4a-5a.

REASONS WHY THE WRIT SHOULD BE DENIED

The courts below concluded that the General Counsel's report to the Commission recommending a finding of no reasonable cause to believe that Local 745 had violated the Act provided a reasonable basis for the Commission's decision to dismiss Brown's administrative complaint. Brown's petition asks this Court to review two issues, neither of which warrants the Court's consideration. The first question—whether the General Counsel's report is an adequate basis for judicial review of a Commission decision to follow the report's recommendation to dismiss an administrative complaint—was expressly resolved in the affirmative by a unanimous Court earlier this Term in *FEC* v. *Democratic Senatorial Campaign Committee ("DSCC")*, —— U.S. ——, 102 S.Ct. 38, 45 n.19 (Nov. 10, 1981). The second question—whether the Commission acted contrary to law in dismissing Brown's complaint after the agency's investigation produced insufficient evidence to demonstrate a violation of the Act—presents only factual questions which do not merit consideration by this Court. Review by this Court is particularly unwarranted here in light of the wide discretion vested in the Commission to determine in the first instance whether or not a civil violation of the Act has occurred and the substantial deference to the Commission's determinations which this Court has found to be required in reviewing the Commission's dismissal of an administrative complaint.

1. Only a few months ago, in *FEC* v. *DSCC*, 102 S.Ct. at 44-46, this Court unanimously decided the

issues raised in the petition concerning the proper role of the courts in reviewing the Commission's dismissal of an administrative complaint. Noting that the Commission has "primary and substantial responsibility for administering and enforcing the Act" and "the 'sole discretionary power' to determine in the first instance whether or not a civil violation of the Act has occurred," the Court held that "the Commission is precisely the type of agency to which defence should presumptively be afforded." *Id.* at 44, *quoting Buckley* v. *Valeo*, 424 U.S. 1, 112 n.153 (1976). Accordingly, the Court observed, "Congress wisely provided that the Commission's dismissal of an administrative complaint should be reversed only if 'contrary to law' ". *Id.* at 45. The Court further explained that in determining whether the Commission's action was "contrary to law," the role of the court was "not to interpret the statute as it thought best but rather the narrower inquiry into whether the Commission's construction was 'sufficiently reasonable' to be accepted by a reviewing court." *Id.* at 46 (citations omitted).

In *DSCC* this Court specifically addressed the question of whether the General Counsel's report is a sufficient basis for review of the Commission's dismissal of an administrative complaint. The court of appeals had declined to accord deference to the Commission's decision, in part because the Commission had not provided an independent explanation of its decision to dismiss the administrative complaint in that case. The court had held that the General Counsel's report could not serve as a "reasoned explanation" of the Commission's action because the Commission "did not explicitly adopt the General Counsel's report and the Commission's own newsletter, the *FEC Record*, has avowed that the

Commission actions 'are not necessarily based on, or in agreement with the General Counsel's analysis.'" *Democratic Senatorial Campaign Committee* v. *FEC*, 660 F.2d 773, 777 (D.C. Cir. 1980) (citations omitted). This Court reversed, holding, as discussed above, that a reviewing court must give substantial deference to the Commission's decision. In particular, the Court expressly rejected the court of appeals' refusal to defer to the rationale stated in the General Counsel's report:

> Nor does the fact that the Commission, following its customary practice, did not expressly adopt the General Counsel's report in announcing its decision "deprive a reviewing court of any Commission record on which to base a deferential decision." 660 F.2d, at 777. The Court of Appeals previously has held that the General Counsel's report to the Commission is sufficient to support the Commission's dismissal of a complaint. See *Hampton* v. *Federal Election Commission*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9036, at 50,439-50,440 (DC 1977), aff'd No. 77-1546, —— U.S. App. D.C. ——, (July 21, 1978) (unpublished opinion). In this case, the General Counsel's report was made public simultaneously with the Commission's ruling. It was the third occasion on which the Commission followed the General Counsel's advice in this matter. Even without an express statement, it is sufficiently clear that the staff report provides the basis for the Commission's action.

Id., 102 S.Ct. at 45 n.19.

Thus, contrary to petitioner's assertion (Pet. at 8), this Court's conclusion in *FEC* v. *DSCC* that the General Counsel's report provides an adequate record for purposes of judicial review was not *dicta*.

Rather, this holding was central to the Court's rationale in reversing the court of appeals' refusal to accord deference to the Commission because of that court's perception that the Commission had failed to provide a reasoned explanation for its action. Accordingly, the court of appeals in this case correctly concluded that this Court's ruling in *FEC* v. *DSCC* was binding precedent.[5]

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[5] Petitioner's suggestion (Pet. at 18-20) that this Court's unanimous holding just seven months ago in *FEC* v. *DSCC* was erroneous, and should now be reversed, is too frivolous to require argument. Indeed, in every one of the many cases in which the courts have been called upon to review the Commission's dismissal of an administrative complaint, they have done so on the basis of the General Counsel's report, and have had no difficulty in properly performing their review function. *See Hampton* v. *Federal Election Commission*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9036 at 50,438 (D.D.C. 1977), *aff'd*, No. 77-1546 (D.C. Cir. July 21, 1978) (unpublished opinion); *In re Federal Election Campaign Act Litigation*, 474 F. Supp. 1044, 1046 (D.D.C. 1979); *Common Cause* v. *Federal Election Commission*, 489 F. Supp. 738 (D.D.C. 1980); *National Republican Senatorial Committee* v. *Federal Election Commission*, No. 80-2266 (D.D.C. March 5, 1981), slip op. at 2; *International Association of Machinists and Aerospace Workers* v. *Federal Election Commission*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9144 at 51,105 (D.D.C. 1980), *aff'd*, 672 F.2d 894 (D.C. Cir. 1981) (table); *National Conservative Political Action Committee* v. *Federal Election Commission*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9057 (D.D.C. 1978), *aff'd as modified on other grounds*, 626 F.2d 953, 956 (D.C. Cir. 1980); *Walther* v. *Federal Election Commission*, 82 F.R.D. 200, 202 (D.D.C. 1979); *Kay* v. *Federal Election Commission*, No. 80-3081 (D.D.C. April 21, 1981), *aff'd*, 672 F.2d 894 (D.C. Cir. 1981) (table); *Epstein* v. *Federal Election Commission*, No. 81-0336 (D.D.C. Sept. 24, 1981), slip op. at 3-4, *appeal docketed*, No. 81-2227 (D.C. Cir. Dec. 22, 1981).

Petitioner's attempt to distinguish this case from *FEC* v. *DSCC* is also unavailing. Here, as in *DSCC*, the General Counsel's report was before the Commissioners at the time that they unanimously voted to dismiss the complaint. Here, as in *DSCC*, the Commission "followed the General Counsel's advice," even though, in accord with "its customary practice," it "did not expressly adopt the General Counsel's report in announcing its decision." 102 S.Ct. at 45 n.19. Thus, the report is not, as Brown suggests (Pet. at 15), a post-hoc rationalization of appellate counsel, but is rather a "contemporaneous explanation of the agency decision" which is adequate to permit "effective judicial review." *Camp* v. *Pitts*, 411 U.S. 138, 142-43 (1973).[6]

Petitioner nevertheless contends that the standard of review articulated by this Court in *FEC* v. *DSCC* is not applicable here because this case involves factual as well as legal questions. Pet. at 19a-21a. However, 2 U.S.C. § 437g(a)(9) provides for only one standard of review and does not distinguish between factual and legal questions. Moreover, it is well settled that even when a formal adjudicatory

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[6] Brown's reliance on *KFC National Management Corp.* v. *NLRB*, 497 F.2d 298 (2d Cir. 1974) is misplaced. Unlike the NLRB members in *KFC*, each Commissioner here personally cast his or her vote to dismiss Brown's complaint and did not delegate any statutory decision-making powers to the staff. Nothing in *KFC* would preclude the Commission from following its customary practice of relying on its staff to summarize the results of the investigation. To the contrary, the court in *KFC* expressly held that the voting members of an agency may rely on summaries and memoranda prepared by their staff in making their decisions. *See also National Nutritional Foods Association* v. *FDA*, 491 F.2d 1141, 1146 (2d Cir. 1974).

decision is under review, an agency's factual determinations are entitled to greater deference by a reviewing court than are legal interpretations. *NLRB* v. *Brown*, 380 U.S. 278, 291 (1965); *Volkswagenwerk* v. *FMC*, 390 U.S. 261, 272 (1967). This distinction has even more force where, as here, judicial review is narrowly limited to a determination whether the agency acted "contrary to law" in exercising its prosecutorial discretion. In such cases, a reviewing court is not to delve into the details of the underlying investigation, but must confine itself to determining whether the justification offered by the agency itself is sufficiently reasonable on its face. *Dunlop* v. *Bachowski*, 421 U.S. 560, 572-573 (1975).[7]

Brown does not identify any occasion in which the Commission, or any court, has reached a conclusion inconsistent with its disposition of this matter. Rather, he argues (Pet. at 21) that the Commission's initial finding of reason to believe that Local 745 violated the Act created an inconsistency with its subsequent finding of no reasonable cause to believe a violation occurred. This argument misconceives the

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[7] In *Dunlop*, this Court held that in reviewing an agency's decision not to prosecute, the court's review should be limited to the agency's statement justifying its action, "and the determination whether the statement, without more, evinces that the [agency's] decision is so irrational as to constitute the decision arbitrary and capricious." 421 U.S. at 572-573. Thus, the courts below properly confined their review in this case to the General Counsel's report, and declined petitioner's request to inquire deeper into the details of the underlying investigation. The cases petitioner relies upon for his contention (Pet. at 16-17) that the courts should have reviewed the underlying factual material involved adjudicatory decisions based upon a formal evidentiary record, rather than a discretionary decision not to prosecute after an investigation.

nature of the Commission's enforcement process. A "reason to believe" finding is merely a determination that the facts alleged in the complaint, if true, would constitute a violation of the Act, and that an investigation is warranted. A finding of no reasonable cause to believe a violation occurred, on the other hand, is made after the investigation and constitutes a decision that the results of the investigation do not warrant further prosecution of the case. These findings are not at all inconsistent; indeed, a "no reasonable cause to believe" finding is always preceded by a "reason to believe" finding. Accordingly, petitioner advances no valid reason whatsoever for departing from this Court's holding in *FEC* v. *DSCC*.

2. The question of whether the Commission acted contrary to law in dismissing Brown's complaint clearly does not merit review by this Court in view of the deference owed to the Commission's discretionary decisions in enforcing the Act. *See FEC* v. *DSCC*, 102 S.Ct. at 45. Review by this Court is even more inappropriate here since the Commission's decision turned primarily upon the particular facts of this case, and resolved no questions of general import. As this Court has stated: "We do not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). *See also NLRB* v. *Hendricks County Rural Electric Membership Corp.*, —— U.S. ——, 102 S.Ct. 216, 221 n.8 (Dec. 2, 1981); *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949). Rather, the Court "will intervene only in what ought to be the rare instance where the standard [of review] appears to have been misapprehended or grossly misapplied." *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 310 (1974). Such is not the case here. Both courts below correctly

applied the standard of review articulated by this Court in *FEC* v. *DSCC* and had no difficulty in sustaining the Commission's dismissal of Brown's complaint.[8]

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[8] Brown's complaints (Pet. at 25) about purported "irregularities" in the Commission's investigation were fully briefed below, and neither court found them to be substantial enough even to merit discussion. Examining the details of the investigative techniques utilized in this particular case, which have already been found adequate by two lower courts, is clearly not a matter warranting this Court's attention. Petitioner has presented no ground for questioning the result reached by the Commission here. To the contrary, the Commission's decision was later independently confirmed by the decision of an NLRB administrative law judge who found, after a full evidentiary hearing, that Brown had been denied membership in Local 745 solely because he had failed to pay his dues at Local 886. *East Texas Motor Freight and International Brotherhood of Teamsters, Local 745*, NLRB JD-734-79 (October 5, 1979) (unpublished) (slip op. at 27). Brown's groundless accusation of bias on the part of some Commissioners amounts to nothing more than "the feeling . . . not uncommon for one against whom decision has gone," that the decision maker, "be he baseball umpire, trial judge or hearing officer, is biased." *NLRB* v. *Lewisburg Chair and Furniture Co.*, 230 F.2d 155, 156 (3d Cir. 1966).

CONCLUSION

For the foregoing reasons, the petition for a *writ* of *certiorari* should be denied.

Respectfully submitted,

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Petitioner's Reply Brief

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Supreme Court of the United States

OCTOBER TERM, 1981

ARCHIE E. BROWN,
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v.

FEDERAL ELECTION COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONER IN REPLY

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ARCHIE E. BROWN,
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BRIEF FOR PETITIONER IN REPLY

INTRODUCTION

In this case, Petitioner's sworn administrative complaint alleging illegal coercive solicitation practices by a local Teamsters Union was dismissed by the Federal Election Commission (FEC) after a factual investigation by its staff without the Commissioners ever stating any reasons for the dismissal, without the Commissioners ever examining any of the factual evidence produced by the staff investigation of the complaint, without the Commissioners ever finding any facts, and without the

Commissioners ever adopting the highly questionable and defective General Counsel's report summarizing the investigation.

The Commission's response to all of this is basically that the Commissioners do not have to state any reason explaining their dismissal, nor examine any evidence, find any facts, or adopt any report, and that for purposes of judicial review, a reviewing court need look no further than to an unadopted report prepared by their General Counsel who did none of the underlying investigation. Respondent's Brief in Opposition at 8 (Resp. Opp.). The FEC bases their position, as did the court below, on a footnote in this Court's decision in *FEC v. Democratic Senatorial Campaign Committee,* 102 S. Ct. 38, 45 n.19 (Nov. 10, 1981), a case which dealt with judicial review of a pure *question of law,* unlike the instant case which deals with mixed questions of law and fact. This reliance was grossly misplaced and this Court must correct the grave error made by the *only* circuit court which can review FEC dismissals of complaints. 2 U.S.C. § 437g (a) (9).

Since the court of appeals has thus already given its dispositive interpretation of this Court's decision in *FEC v. DSCC* regarding the standard of judicial review of agency action and the proper composition and function of an administrative record, the issues presented here will only reoccur. Consequently, this case is in the best posture for review to enable this Court to correct the gross misapplication of its decision in *FEC v. DSCC.* Petitioner believes that this reply is further necessary to respond to the serious misconceptions by the respondent which demonstrate all the more why review of this case is warranted.

I. THE COMMISSIONERS NEVER CONSIDERED ANY OF THE UNDERLYING FACTUAL OR EVIDENTIARY MATERIALS GENERATED IN THIS CASE

In its opposition, the FEC demonstrated a complete lack of understanding of the fundamental differences between a dismissal *before* an investigation into a complaint, and a dismissal *after* a factual investigation. In the first class of cases, *i.e.*, *pre*-investigation dismissals, the General Counsel's report presented to the Commissioners argues that as a *matter of law*, a particular complaint should be dismissed because the allegations of illegal conduct do not state a case under the Federal Election Campaign Act of 1971, as amended (FECA). In this first class of cases, the *only* document generated by the Commission's staff *is* the General Counsel's report which is placed before the Commissioners prior to their decision. The administrative record for judicial review thus consists of only this single document. In this category belong cases such as *FEC v. DSCC*. *See also* cases cited in Resp. Opp., at 11, n.5.

In the second class of cases, *i.e.*, *post*-investigation dismissals, such as the instant case, the Commission's staff investigates the *facts* of a case, and later the General Counsel presents a report purporting to summarize all the *factual* information and evidence, and purporting to resolve the mixed questions of *law and fact*. However, the Commissioners in this case (and others of this *post*-investigatory class or category) *never examined any* of the factual or evidentiary material developed by their staff, or what normally would be called the "administrative record" in any other federal agency. The Commission thus erroneously treats *post*-investigatory cases like *pre*-investigatory ones—examining only a short staff report before dismissing a case.

Petitioner is not suggesting, as the Respondent would have the Court believe (Resp. Opp. at 8, 14), that this

Court examine or review the factual questions of this case. Rather, Petitioner submits that in this class of *post*-investigatory dismissals, the *Commissioners* are the ones who should be examining the factual evidence, or the complete administrative record, in the first instance. And the reviewing courts should satisfy themselves that the decisionmakers did examine rather than ignore the evidence, something which the reviewing courts failed to do in this case.

Post-investigatory dismissals are clearly qualitatively different from pre-investigatory ones. The decisionmakers' decision to dismiss after an investigation must be based on and supported by some explanation or statement of reasons linking or connecting the dismissal decision to the facts in record and the Commissioners' resolution of them. *SEC v. Chenery Corp.*, 332 U.S. 194 (1946); *Dunlop v. Bachowski*, 421 U.S. 560 (1975); 5 U.S.C. §555(e). Only in such situations could there ever be any meaningful judicial review to determine whether the Commission's exercise of its discretion to dismiss a complaint was arbitrary or capricious.

But in this case, there was no statement of reasons by the decisionmakers and the "administrative record" was found to consist of only the General Counsel's report despite the existence of over 125 other investigatory documents (of which only 30 were selectively submitted by the FEC to the reviewing court and there claimed by the FEC to constitute the "administrative record.")

Thus, the FEC's position is inherently flawed and misconceived when it states, for example, that

> [r]eview by this Court is even more inappropriate here since the Commission's decision turned primarily upon the particular facts of this case, and resolved no questions of general import.

Resp. Opp. at 14.

On the contrary, the "Commission's decision turned primarily upon "*no* particular "facts"—the decision to dismiss was not based on any facts since none were considered or examined by the Commissioners. Further, the Commission's decision not only "resolved no questions of general import," it resolved no questions of *any* import—the Commission quite candidly admits that it does not make or state any findings of fact. *See* Pet. Brief at 5. Thus, respondent's argument that "an agency's factual determinations are entitled to greater deference by a reviewing court than are legal interpretations" (Resp. Opp. at 13) makes absolutely no sense here because the FEC made no "factual determinations" in this or any other post-investigatory case. Indeed, the Commission made no legal interpretations or conclusions of law either.

II. THE UNADOPTED GENERAL COUNSEL'S REPORT CANNOT SIMULTANEOUSLY SERVE AS THE DECISIONMAKERS' STATEMENT OF REASONS AND THE ENTIRE ADMINISTRATIVE RECORD

Petitioner submits that it is violative of well established principles of administrative law for a staff report to function simultaneously as both the decisionmakers' statement of reasons and the entire administrative record where 1) the report was *not* adopted by the Commissioners as their own, and 2) where there are over 125 investigatory documents generated in this case, *none* of which were submitted to or examined by the Commissioners, and only 30 of which were arbitrarily selected and filed with the district court. At best, the respondent may argue that *if* the Commissioners had expressly adopted the report, it may be considered to be their statement of reasons for the dismissal; but even if this were so, the report can never also serve as the entire administrative record for purposes of judicial review in a case such as this where there has been a factual investigation. Not surprisingly, respondent's brief does not

address this key issue or those cases which do not countenance such strange and irregular administrative behavior. *See, e.g., City Fed. Sav. & Loan Ass'n v. Federal Home Loan Bank Board*, 600 F.2d 681, 687-89 (7th Cir. 1979) described in Petition at 16-17, & n.9.

Instead, respondent quotes from *Camp v. Pitts*, 411 U.S. 138 (1973) and argues that the unadopted report is "a 'contemporaneous explanation of the agency decision' which is adequate to permit 'effective judicial review.'" Resp. Opp. at 12. Respondent's reliance on *Camp v. Pitts* for such a proposition is wholly misplaced; if anything, that decision supports petitioner's case. The "contemporaneous explanation" referred to in *Camp v. Pitts* were two letters stating the reasons *by the decisionmaker* and not some staff report. In addition to these express letters of explanation, "[t]he *entire* administrative record was placed before the [reviewing] court." 411 U.S. at 139 (emphasis added). Finally, "the *only* deficiency suggested . . . is that the Comptroller inadequately explained his decision." *Id.* at 142 (emphasis added). The differences between the instant case and *Camp v. Pitts* are obvious and significant: there is no letter of explanation of *any* kind by the decisionmakers here; the entire FEC administrative record of some 125 documents was not placed before the reviewing court; and there are deficiencies here in addition to the adequacy of the agency's explanation, *e.g.*, that the decisionmakers never examined the evidence and that the General Counsel's report evidenced a multitude of investigatory irregularities and flawed legal analysis.

CONCLUSION

The court of appeals misapprehended or grossly misapplied the standard of review of post-investigatory dismissals by accepting an unadopted staff report as both the administrative record and the decisionmakers' statement of reasons. The issues presented here are substantial questions concerning the proper standard of judicial

review and the scope or application of this Court's opinion in *FEC v. DSCC*. To leave the circuit court's opinion undisturbed would be to sanction a radical departure from the sound principles of judicial review developed by this Court over the last several decades, and to reduce the role of a reviewing court to a rubber-stamp of agency action. Such a result should not be countenanced especially where, as here, Congress has expressly made FEC dismissals of complaints judicially reviewable and where, as here, the subject matter of complaints lodged with the Commission go to the heart of the integrity of the electoral process, and touch upon constitutionally protected rights.

For these reasons, the petition should be granted.

Respectfully submitted,

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Amicus Brief

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No. 81-1905

IN THE

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OCTOBER TERM, 1981

ARCHIE E. BROWN,

Petitioner,

v.

FEDERAL ELECTION COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE
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FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* CENTER ON NATIONAL LABOR POLICY IN SUPPORT OF WRIT OF CERTIORARI

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MOTION OF CENTER ON NATIONAL LABOR POLICY FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION OF ARCHIE E. BROWN

The Center on National Labor Policy hereby respectfully moves pursuant to this Court's Rule 36 for leave to file its brief *amicus curiae* in support of the petition of Archie E. Brown. Consent was sought from all parties and received from Petitioner and denied by Respondent Federal Election Commission.

The accompanying brief urges this Court to grant the petition and to reverse the judgment of the United States Court of Appeals for the District of Columbia Circuit, in *Brown v. Federal Election Commission*, No. 80-2108 (D.C. Cir. Nov. 20, 1981).

The Center on National Labor Policy is a nonprofit, nonpartisan organization chartered as a public-interest legal foundation to engage in national litigation in matters affecting the public interest. Among its objectives, the Center is concerned about the adverse impact of pressure groups on the civil rights of the public, consumers, taxpayers, and workers. Private pressure groups, such as organized labor groups, have a history of significant impact on the rights of the public, consumers, taxpayers, and workers. As this Court recognized in *Connell Construction Co. v. Plumbers and Steamfitters, Local No. 100*, 421 U.S. 616, 625 (1975), union pressure "could result in significant adverse effects on the market and on consumers. . . ."

The Center, as a public-interest organization, believes that the individual rights of consumers, taxpayers, workers, and public citizens are paramount to the collective rights of pressure groups such as labor unions. Briefs *amicus curiae* have been filed by the Center in other recent Supreme Court cases, including, *Larry V. Muko, Inc. v. NLRB*, No. 80-1798; *Donald Schriver, et al. v. Pennsylvania Building and Construction Trades Council*, No. 80-1257.

The parties to the instant case are primarily focusing on the important administrative and judicial review issues. Equally important, however, is the underlying substantive claim made by Petitioner and dismissed by Respondent—that he and others were unlawfully threatened and coerced by union officials to contribute

to the union's political action committee, thereby violating an important and key provision of the election laws.

The right to support or to refrain from supporting political candidates is one of the most important rights in a democracy. *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977); *Buckley v. Valeo,* 424 U.S. 1 (1976); *Railway Clerks v. Allen,* 373 U.S. 113 (1963); *International Association of Machinists v. Street,* 367 U.S. 740 (1961). The Center is deeply concerned that if this Court permits the Federal Election Commission to refrain from documenting a dismissal of serious allegations of compulsory political contributions, the right to refrain from contributing to political candidates and committees will be effectively nullified.

The Center on National Labor Policy can thus bring to this case a diverse perspective not presently represented. Therefore, the Center's participation can assist the Court in obtaining full consideration of the public-interest issues.

The respondent's position in denying its consent to the filing of the *amicus* brief, is that a constitutional issue is not presented in this lawsuit. This myopic view misreads the purpose of 2 U.S.C. § 441b(b)(3)(A), which is an intended codification of the First-Amendment right of freedom of association.

Accordingly, the Center on National Labor Policy respectfully requests leave to file the annexed brief *amicus curiae* in support of Petitioner Archie E. Brown.

Respectfully submitted,

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INTEREST OF *AMICUS*

The Center on National Labor Policy is a national nonprofit organization chartered as a public-interest legal foundation to engage in national litigation in matters affecting the public interest. Among its objectives, the Center is concerned about the adverse impact of pressure groups on the civil rights of the public, consumers, taxpayers, and workers.

The decision of the Court of Appeals has created a need for this Court to determine whether or not the Federal Election Commission may present to a federal court for judicial review a record consisting of only an *unadopted* General Counsel's Report, when the gravamen of the complaint is a violation by union officials of the First-Amendment right of Freedom of Association and 2 U.S.C. § 441b(b)(3)(A).

The Center, as a public-interest organization, believes that the individual rights of consumers, taxpayers, workers, and public citizens should be paramount to the collective privileges of pressure groups such as labor unions. Where the individual constitutional rights of workers are sacrificed to these pressure groups, the public interest is substantial. Consequently, the Center's concerns about their impact are significant.

Further background and interests of *amicus* have been detailed in the preceding motion to file this brief.

ISSUE PRESENTED

When a complainant alleges a serious violation of a First-Amendment right as codified in the Election Laws, and where the Federal Election Commission initially investigates the charges but subsequently dismisses them, may a court accept an *unadopted* General Counsel's Report as the entire record upon which to meaningfully conduct judicial review in order to determine if the Federal Election Commission has formulated its decision to dismiss a complaint in an arbitrary and capricious manner?

INTRODUCTION

Petitioner Archie E. Brown filed an administrative complaint with the Federal Election Commission (hereinafter "FEC" or "Commission") alleging that employees, agents and officials of Teamsters Local 745 had violated 2 U.S.C. § 441(b) of the Federal Election Campaign Act ("FECA") which prohibits coercion in extracting political contributions as a condition of employment. Mr. Brown, a truck driver, was allegedly coerced with threats and financial reprisals to contribute to and join the Teamsters Union Democratic Republican Independent Voter Education ("DRIVE") political action committee.

The Commission initially found "reason to believe" that the FECA had been violated and conducted an investigation. *Pet.*, Appendix E. The Commission thereafter dismissed the complaint, providing no reason for its decision. *Pet.*, Appendix D.

Petitioner sought review in the United States District Court for the District of Columbia and demonstrated the irregularity, inconsistency, and perfunctory manner in which the investigation was conducted and the FEC decision was rendered. However, the district court sustained the Commission's findings.

The United States Court of Appeals for the District of Columbia Circuit, subsequent to oral argument in the case, upheld the district court on the basis of footnote 19 located in this Court's recent decision in *FEC v. Democratic Senatorial Campaign Committee,* 102 S. Ct. 38, 45 n.19 (1981). That footnote expresses the acceptance for purposes of judicial review, of the FEC General Counsel Report when that report deals with pure questions of law, which is not the case here. In addition, the

FEC stated on the record that "[the] Commission did not adopt the general counsel's report." Transcript, Oct. 23, 1981 at 4-6 *Pet.*, at 7.

Solely on this basis, the Court of Appeals ruled that "[the] absence of reasons supplied or adopted by the Commission itself, the [Supreme] Court concluded, does not deprive a reviewing court of an informed basis on which to ground a deferential decision." *Pet.*, Appendix 3a. This is a serious error of law.

ARGUMENT

I.

THE RIGHT OF ASSOCIATION IS IMPLICITLY RECOGNIZED IN EVERY COMPLAINT WHICH ALLEGES A VIOLATION OF THE FEDERAL ELECTION CAMPAIGN ACT

The First-Amendment right of Freedom of Association was embodied in Petitioner's complaint with the Federal Election Commission from the moment it was filed. Title 2 U.S.C. § 441b(b)(3)(A), proscribes a "labor organization" from using coercion in the form of "physical force, job discrimination, financial reprisals, or the threat of force, job discrimination or financial reprisals or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment" when it is soliciting funds for its established political "separate segregated fund" from which political contributions and expenditures are made. Petitioner alleged that Teamsters Local 745 was violating this section of the Act.

The gravamen of the complaint—an allegation of a violation of the First-Amendment Freedom—is implicated further by the inadequacy of the FEC's administrative investigatory procedures.

In the instant case, Congress codified in the Federal Election Campaign Act, 2 U.S.C. §§ 441 *et seq.*, the essence of the First-Amendment freedom of association. Thus, when a complainant files a complaint with the FEC alleging a violation of this section of the Act, he is implicitly stating that there has been a serious abridgement of his constitutional rights.

Since Congress thought it necessary to codify the freedom of association right so that it could not be violated with impunity in the political arena, Petitioner states a constitutional violation when he alleges a violation of 2 U.S.C. § 441(b)(3)(A). Furthermore, the entire FEC investigation in this case was apparently conducted to determine if this section of the statute was violated.

II.

THE FEC FAILED TO REDRESS AN ABRIDGEMENT OF PETITIONER'S CONSTITUTIONAL FIRST-AMENDMENT RIGHT OF FREEDOM OF ASSOCIATION

Under the Federal Election Campaign Act, 2 U.S.C. § 441b(a), it is unlawful for a labor organization to make a direct contribution to a candidate for federal office, or to any political committee established to urge the election or defeat of clearly-identified federal candidates. The labor organization, under 2 U.S.C. § 441b(b)(2)(c), may use its own funds to establish, administer and solicit *voluntary* contributions for a "separate segregated fund" and only money from this *voluntary* "fund" may be contributed to federal candidates and committees.

Section 441b(b)(3)(A), which codifies the freedom of association, is the basis of Petitioner's complaint. Mr. Justice Douglas, though dissenting, was undoubtedly

uttering a fixed truth when he said that "[t]he right of association is an important incident of First Amendment rights. The right to belong—or not to belong—is deep in the American tradition." *Lathrop v. Donohue*, 367 U.S. 820, 881-82 (1961). Justice Frankfurter, saw the "right of association [as] peculiarly characteristic of our people," *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (concurring opinion), and twenty years later Mr. Justice Powell placed freedom of association among the great basic rights "implicit in the freedoms of speech, assembly, and petition." *Healy v. James*, 408 U.S. 169, 181 (1972), *See, e.g., Baird v. State Bar of Arizona*, 401 U.S. 1, 6 (1971); *NAACP v. Button*, 371 U.S. 415, 430 (1963); *Louisiana v. NAACP*, 366 U.S. 293, 296 (1961). It is this section of FECA that codifies the decisions of this Court rendered in *Lathrop v. Donohue, supra, NAACP v. Button, supra,* and *Healy v. James, supra,* which found that an individual has the constitutional right to associate and to *refrain* from associating with a political group with which he does not agree. Furthermore, the right to associate or to refrain from associating with a particular group was enunciated further in *Abood v. Detroit Board of Education*, 431 U.S. 209, 235-36 (1977), where Mr. Justice Stewart stated:

> We do not hold that a union cannot constitutionally spend funds for the expresion of political views, on behalf of political candidates, or toward the advancement of other ideological causes. . . . Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are *not coerced* into doing so against their will. . . .

(Emphasis added.) *See also International Association of Machinists v. Street*, 367 U.S. 740 (1961), in which

this Court held that union officials may not use an employee's money, over his *objection* to support a political cause he opposes. *See Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express and Station Employees v. Allen*, 373 U.S. 113 (1963).

While a showing of state action is not necessary to prove a violation of 2 U.S.C. § 441b(b)(3)(A), this Court has recognized that because the federal labor laws confer certain powers on labor unions, state action is almost necessarily present in any action by a labor union affecting its members or the employees it represents:

> The loss of individual rights for the greater benefit of the group results in the power of the representative of the group—the union. But power is never without responsibility. And when authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself.

Communications Association v. Douds, 339 U.S. 382, 401 (1950).

Congress has provided an enforcement mechanism for the provisions of the FECA, with primary responsibility entrusted to the Federal Election Commission. *See* 2 U.S.C. §§ 437c-438. These enforcement provisions are exclusive to the FEC and this Court has held that "a private cause of action [for an alleged violation of FECA] is not available." *Cort v. Ash*, 422 U.S. 66, 77 (1975). Thus, if the FEC is given unfettered discretion to dismiss serious complaints of violations of the Act, which the lower court opinion gives it, the FEC can administratively nullify any provisions of the Act. Even a provision like 2 U.S.C. § 441b(b)(3)(A), could be administratively nullified by the agency by conducting a perfunctory

investigation and then making a decision to dismiss the complaint without giving any reasons for its decision. When there is a codification of a constitutional right, Petitioner urges that a standard similar to a "strict scrutiny" one be used in evaluating the thoroughness of an investigation. The lower courts in this case failed to provide any scrutiny of the FEC's action.

In a land of free people where members of the government are elected, the freedom to associate with other people whose political views are aligned with their own is a right which must be zealously guarded. Congress realized the importance of this freedom of association in the political arena. To guard against any infringement upon this most precious right, Congress *codified* it.

When the Commission is permitted to dismiss a complaint, which alleges a violation of a section of the Act that is a codification of a constitutional right, on the basis of an investigation which does not comport with a strict scrutiny standard, then the Commission is not only nullifying the section of the Act which was allegedly violated, but the FEC is in reality abridging the guaranteed rights of the First Amendment. That Congress was fully aware of the fact that the FEC operates in an area which involves First Amendment interests, is demonstrated by the judicial review provision in FECA which reads:

> Any party aggrieved by an order of the Commission dismissing a complaint . . . may file a petition with the United States District Court for the District of Columbia. 2 U.S.C. § 437g(a)(8).

Congress's awareness of the sensitive involvement of First-Amendment rights in the area in which the FEC would be exercising its jurisdiction is further demonstrated when the above-quoted provision is compared

with the analogous but different provision found in the National Labor Relations Act which reads:

> [The General Counsel] shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints. . . . 29 U.S.C. § 153(d)

Whereas the General Counsel of the National Labor Relations Board appears to have absolutely unfettered discretion to refuse to issue a complaint, Congress, desirous of protecting the rights afforded by the First Amendment, placed a specific restraint on FEC discretion by providing for judicial review if the complaint is dismissed.

III.

THE FEC HAS FAILED TO PROVIDE THE COURT OF APPEALS WITH ITS OWN INDEPENDENT FINDINGS OR WITH AN ADOPTED GENERAL COUNSEL'S REPORT

Petitioner's complaint filed with the FEC alleged that agents of Local 745 of the Teamsters' Union denied him union membership and used coercion to get him to join their political action committee (DRIVE) and by doing so, violated 2 U.S.C. § 441(b) of the FECA.

The Commission initially found "reason to believe" that a violation had occurred. The General Counsel's office then conducted an investigation, and issued a Report summarizing the investigation. It is clear that the General Counsel's Report did not adequately present the entire record and leaves many issues open to question.

The Commission thereafter found "no reasonable cause to believe" that 2 U.S.C. § 441(b) was violated and so notified Petitioner, without providing any explanation as to why it found no "cause" when the General

Counsel did. When the Petitioner appealed to the District Court for judicial review, the Commission submitted for the Court's consideration selected documents from its files, including the General Counsel's Report. At *no time* did the Commission ever adopt the Report as its own, nor did the Commission ever give any reasons for finding that the Report was or was not intended to represent the entire record of its proceedings. Therefore, the Commission essentially provided *no* record for a federal court to review. Other agencies, such as the National Labor Relations Board, clearly specify if they are adopting their staff's findings.

To compound the questionable behavior here is the fact that the FEC General Counsel's report is, as a matter of practice, not available to a complaining party at any time until he seeks judicial review of the dismissal of his case. The FEC's enforcement rules do not permit the filing of briefs by the complainant or give the complainant the opportunity to point out or correct any factual errors in the General Counsel's Report to the Commission. 11 C.F.R. §§ 111.1-111.10. Further, the complainant is *never* informed of the progress and status of his complaint or the FEC investigation so that he may gauge how he might assist the Commission.

Moreover, throughout the investigation only the respondent is guaranteed the right to file briefs and otherwise state his position to the Commission:

> The Commission shall not take any action, or make any finding against a respondent other than action dismissing the complaint, unless it has considered such response or unless no such response has been served upon the Commission within the fifteen (15) day period specified in 11 C.F.R. § 111.6(a).

11 C.F.R. § 111.6(b) (1981). No such opportunity is provided the complainant. In fact, 11 C.F.R. § 111.8(b) requires that only the respondent be notified of the legal basis and facts contained in the staff report.

In the instant case, only in the district court did the FEC finally attempt to designate a record for review. Of the 123 documents in its file, the Commission provided only 22 to the Court, and even then, the agency was unsure which were relevant. Of these 22 uncertified documents presented to the district court, Petitioner was particularly able to point out extensive factual errors in their "record."

However, without benefit of a technical administrative record, the District Court and the Court of Appeals permitted the administrative decision to stand. *Amicus* agrees with Petitioner when he contends that this decision represents a usurpation and abandonment of the Commission's responsibility to establish a full record. The District Court and the Court of Appeals violate this Court's long-standing decision that "an appellate court cannot intrude upon the domain entrusted by Congress to an administrative agency." *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 88 (1943).

The practical reasons for requiring administrative findings are powerful insofar as they facilitate judicial review, avoid judicial usurpation of administrative functions, assure careful administrative considerations, help parties plan their cases for rehearing and judicial review, and help keep agencies within their jurisdictions. K. C. Davis, *Administrative Law Text*, 3d Ed. § 16.03 (1972).

In Petitioner's case, the opportunity for an arbitrary and capricious determination was great. The Commission

dismissed the complaint without any explanation and thereby precluded Petitioner from the "bundle of mechanisms" which were provided for his protection such as open standards, open findings, open reasons and open precedents. K. C. Davis, *Administrative Law Text* (3d Ed. 1972).

By *not presenting* the District Court and Court of Appeals *its own findings* (or at least an adopted General Counsel's Report), the Commission has violated "the orderly functioning of the process of review [which] requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." *Securities and Exchange Commission v. Chenery Corp., supra* at 462. When the Commission is permitted to circumvent the requirement of providing substantial evidence and reasoned findings, the Commission is "on its way to becoming 'a monster which rules with no practical limits on its discretion.'" *Baltimore & Ohio R. Co. v. Aberdeen & Rockfish R. Co.*, 393 U.S. 87 (1968). In addition, by not notifying Petitioner of the reasons for the dismissal of his complaint, the Commission further violates the Administrative Procedure Act, 5 U.S.C. § 555(e), which provides: "[e]xcept in affirming a prior denial or when the denial is self-explanatory, the notice should be accompanied by a brief statement of the grounds for the denial."

Since the Commission has not indicated that it determined the General Counsel's Report to be accurate nor did it indicate whether or not it questioned the sufficiency or the intensity with which the investigation was conducted, the General Counsel's Report simply cannot be imputed to the Commission and should not have been permitted to be presented as the administrative record subject to judicial review. Petitioner's case is not

unique; in dozens of other cases where the Commission initially finds "reason to believe" that violations have occurred, and then dismisses them after investigation, the FEC has a practice of not issuing any reasons therefor or making any findings of law or fact.

This Court's holdings have established the doctrine that a reviewing Court must look to the agency's written opinion, not to the *post hoc* arguments of its counsel, as the basis for its order. "Congress has delegated to the administrative official and not to appellate Counsel the responsibility for elaborating and enforcing statutory commands." *Investment Co. Institute v. Camp*, 401 U.S. 617, 626 (1971). *See also F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972); *Federal Power Commission v. Texaco Inc.*, 417 U.S. 380, 397 (1974).

For the reasons stated in the petition for certiorari, the FEC's investigation is totally inadequate for the gravity of the complaint. Furthermore, it was error for the Court of Appeals to permit the General Counsel's Report to be accepted as the entire record when the Commission did not state any reason for accepting the General Counsel's Report and especially when the FEC Counsel stated by its own *admission* that "the Commission did *not* adopt the General Counsel's report." *Pet.*, p. 7.

Moreover, the Commission, at a minimum, should comply with *Dunlop v. Bachowski*, 415 U.S. 560, 571 (1975), and give a statement of reasons as to why it dismissed that complaint.

Without a record *provided by the Commission* independently or by adoption, the reviewing Court has no record upon which to make its determination as to whether the dismissal was for a proper reason. For the lower courts to have stepped into the Commission's

shoes and to have arrived at a determination that an unadopted General Counsel's Report really is the record, is a reprehensible usurpation of the responsibilities placed on a government agency to provide a complete record.

To uphold the Commission's action on the record presented in the instant case is not judicial deference; it is tantamount to a judicial abdication which nullifies 2 U.S.C. §§ 437g(a)(8) and 441b(b)(3)(A).

IV.

FUTURE REVIEW IN THIS COURT WILL BE PRECLUDED AS THE FEDERAL ELECTION CAMPAIGN ACT FORECLOSES THE POSSIBILITY OF CONFLICTING DECISIONS AMONG THE CIRCUIT COURTS

The Federal Election Campaign Act provides that judicial review is available *only* in the United States District Court for the District of Columbia and thus for appeal, *only* in the United States Court of Appeals for the District of Columbia Circuit. 2 U.S.C. § 437(g)(8)(A). Therefore, the possibility of a conflicting decision among the Circuit Courts is forever precluded.

The Court of Appeals has ruled that a General Counsel's Report which has not been adopted nor commented upon by the decision makers, may be submitted as the *entire administrative record.* It based its decision on a footnote of this Court's decision in *FEC v. Democratic Senatorial Campaign Committee,* ___ U.S. ___, 102 S. Ct. 38, 45 n.9 (1981). Such an interpretation by the Court of Appeals is contra all prior holdings of this Court which require agencies to present the "grounds upon which the administrative agency acted." *Securities and Exchange Commission v. Chenery,* 318 U.S. 80, 94 (1943). Consequently, in violation of this Court's

holding in *Chenery*, the FEC, through a *single* ruling of the Court of Appeals in this case, need not ever be obliged to adopt its staff's reports, explain why it may concur with those reports or ever present any findings in support of its decisions. No other circuit court will even have an opportunity to rule on this issue as review is statutorily limited to the Court of Appeals for the District of Columbia Circuit.

Consequently, if this Court does not grant this Petition for Writ of Certiorari, the Court of Appeals for the District of Columbia Circuit will have established a new judicial review rule which is contrary to basic administrative law which imposes upon government agencies the duty to provide a reviewing court with reasons for its decisions and an administrative record in which to justify their action. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

CONCLUSION

This case presents grave questions of constitutional law, as the statutory right of unions to have "separate segregated funds" leads to infringement upon the constitutional rights of workers whose political views are not in accord with those of union officials. The FEC has the statutory responsibility to thoroughly investigate violations of the statute designed to protect these First-Amendment rights. It is also compelled under basic administrative law to present to the Court a complete administrative record which the Commission has independently prepared or explicitly adopted. The Commission has failed to carry out their important responsibility and the lower courts have not ordered it to comply with the law which was designed to safeguard associational rights and other rights to preserve our

electoral process. For these reasons, the Center on National Labor Policy respectfully requests that this Court grant the Petition for a Writ of Certiorari and reverse the decision of the Court of Appeals.

Respectfully submitted,

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